Petition

81-882

FILED
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ALEXANDER L. STEVAS

No. -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHNS-MANVILLE CORPORATION,
JOHNS-MANVILLE SALES CORPORATION,
OWENS-CORNING FIBERGLAS CORPORATION,
H.K. PORTER COMPANY, INC.,
SOUTHERN TEXTILE CORPORATION,
PITTSBURGH CORNING CORPORATION,
RAYBESTOS-MANHATTAN, INC.,
THE CELOTEX CORPORATION,
UNARCO INDUSTRIES, INC., and
EAGLE-PICHER INDUSTRIES, INC.,

Petitioners,

v.

JOHN W. WHITE,
JAMES T. OMAN,
FRED R. WALKER,
HUGH V. REYNOLDS, and
WILLIE A. GIBBONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

I. QUESTION PRESENTED FOR REVIEW

DID THE CIRCUIT COURT MISAPPLY THE *EXECUTIVE JET* STANDARD IN EXTENDING ADMIRALTY JURISDICTION TO SHIPYARD ASBESTOS WORKERS, THUS HAVING AN IMPACT UPON THOUSANDS OF SIMILAR CASES THROUGHOUT THE COUNTRY?

II. PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The corporate parents, subsidiaries and affiliates of the petitioners (required by S.Ct.R. 28.1) are:

As to Johns-Manville Corporation and Johns-Manville Sales Corporation:

Holophane S.A. de C.V.
Johns-Manville S.A. (Mol)
Kingsey Falls Paper, Inc.
Kisilidjan h.f.
P.I.C. Holding Limited, Interpak Ltd., Subsidiary of P.I.C.
Polymer International (N.S.) LH
Railroad Friction Products
Advocate Mines Ltd.
Manufacturera e Inversionista S.A.
Asbestos de Mexico S.A.
Cobra Friction Products, Ltd., now Cobra Canada, Inc.
Compania Minera Navajoa S.A.
Dialmecon S.A. de C.V.
Mosaicos de Madera de Mexico S.A. de C.V.
True Line Joint Venture

As to Owens-Corning Fiberglas Corporation:

Bayer-Owens-Corning Glass Wool, S.A. (Belgium)
Veroc Technology A.S. (Norway)
Fiberglas Canada, Inc.
Australian Fibre Glass Pty., Ltd.
Fiberglas Columbia, S.A.

New Zealand Fibre Glass, Ltd.
Scandinavian Glasfiber AB (Sweden)
Vitro-Fibras, S.A. (Mexico)
Eurostar, S.A. (France)
Polyplaster, S.A. (Brazil)
Amiantit, Fiberglass Industries, Ltd. (Saudi Arabia)
ACI Fibreglass (Philippines), Inc.
Asahi Fiber Glass Company, Ltd. (Japan)
Fiberglass South Africa Pty. Ltd.
Arabian Fiberglass Insulation Company

As to H.K. Porter Company, Inc., and Southern Textile Corporation:

Fansteel Inc.
Macmillan, Inc.

As to Pittsburgh Corning Corporation:

PPG Industries, Inc.
Corning Glass Works

As to Raybestos-Manhattan, Inc.:

Raybestos (Canada) Inc.
R/M Disc, Inc.
Raybestos-Manhattan (Australia) Pty. Ltd.
Raybestos-Manhattan GmbH & Co.
Raybestos-Manhattan Europe, Inc.
Daikin-R/M Co. Ltd. (Joint Venture)
Naja, Inc.
Interserco Ltd.
Celestial Ltd.
R/M, Inc.
Itapsa (Joint Venture)
RM Formed Products Co.
The Milford Rivet & Machine Co.
The Milford Rivet & Machine Co. of Delaware, Inc.
Modulus Division
Modulus Corporation
Screw & Bolt Division
Modulus International
Modform Illinois, Inc.
Modform Ohio, Inc.
Minette Mills, Inc.
Minette Corporation

Minette Sales Corporation
Radnor Television Corp.
Modform Moline, Inc.
Precision Cold Forged Products, Inc.
Midwood Industries, Inc.
Tube-Line Corporation
Hi-Shear Corporation
Hi-Shear Holdings Limited
HSI Properties
Woodland Enterprises Ltd.
Midwest Tubular Corp.
Southwest Tubular Corp.
Tube Line DISC, Inc.
Hi-Shear Caribe
Hi-Shear DISC
Aircraft Fasteners (Forged Parts) Limited

As to The Celotex Corporation:

Jim Walter Corporation
Celotex-Marley, Inc.

As to Unarco I. dustries, Inc.:

UNR Industries, Inc.

As to Eagle-Picher Industries, Inc.:

None

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DID THE CIRCUIT COURT MISAPPLY THE *EXECUTIVE JET* STANDARD IN EXTENDING ADMIRALTY JURISDICTION TO SHIPYARD ASBESTOS WORKERS, THUS HAVING AN IMPACT UPON THOUSANDS OF SIMILAR CASES THROUGHOUT THE COUNTRY? 2

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V. OPINIONS IN COURTS BELOW

The Trial Court rendered an unreported Memorandum Opinion and Order dated March 30, 1978 (App. 1a) finding ". . . no significant relationship between the wrongs here alleged, the hazards of asbestos products applied to pipes and insulation, and 'traditional maritime activity involving navigation and commerce in navigable waters.' " By written opinion, F.2d (4th Cir. 1981) (App. 21a), the appellate court invaded the province of admiralty jurisdiction by creating a *marketing technique* test and *worker status* test.

VI. GROUNDS OF JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) to review an opinion of the U.S. Court of Appeals for the Fourth Circuit dated October 5, 1981 (App. 21a). The Mandate has been stayed by Order dated October 23, 1981 (App. 41a).

VII. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS.

None.

VIII. STATEMENT OF THE CASE

These petitioners are among the many manufacturers of asbestos-containing products who have been sued by approximately Three Hundred Fifty (350) plaintiffs in the U.S. District Court for the Eastern District of Virginia. Jurisdiction in these actions is based on diversity of citizenship, 28 U.S.C. §1332(a) (1).[1] The allegation of fault in these cases, as in every case, shipyard worker or not, is that defendants failed to

[1] The complaints also allege alternative theories of jurisdiction including admiralty under Fed. R. Civ. P. 9(h).

warn plaintiffs of potential hazards of handling their asbestos-containing products (Complaints at ¶13, App. 50a-53a, 71a-74a).

District Judge MacKenzie, familiar with the multiple aspects of the cases before him, ruled that admiralty jurisdiction did not apply, stating:

> The defendants here, manufacturers and distributors of asbestos products, are liable, if at all, on the basis of the hazards of their product, as manufactured, not because it was, or was not, installed on a ship. A tort arising from a hazardous pipe covering material bears no relationship to traditional maritime activity. A furniture manufacturer in High Point selling desks to a Norfolk Shipyard, would seem not to subject himself to admiralty jurisdiction on the fortuitous circumstances that the desk ended up in the Captain's cabin, as opposed to an office of the Shipyard.

(App. 4a-5a).

These cases were tried in late 1979. They were submitted to the jury under failure to warn theories of liability and resulted in verdicts for the plaintiffs. On motion, these verdicts were set aside and judgment entered for defendants, since damages were not supported by the evidence. On Appeal these judgments were vacated and the cases remanded with instructions to apply admiralty law.[2]

The appellate court restated the nexus test of *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972). (App. 33a), but then failed to follow it and created a *worker status* test ("the work done by these shipyards bears 'significant relationship to traditional maritime activity' because the installation of the asbestos products has a direct effect on marine navigation and commerce") (App. 34a) and a *marketing technique* test ("the materials used by these shipyard

[2] Admiralty law would extend different standards to shipyard workers for the application of statutes of limitation, comparative negligence, strict liability, and measure of damages than to those workers handling the same products solely on land.

workers were designed, advertised, and marketed as maritime asbestos products").[3] (App. 35a). This petition seeks review of that error.

IX. REASONS FOR ALLOWANCE OF WRIT.

1. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT.

This Court in *Executive Jet, supra,* gave official recognition to the growing acceptance of nexus as a prerequisite to admiralty jurisdiction. It specified that nexus required ". . . that the *wrong* bear a significant relationship to traditional maritime activity". 409 U.S. at 268 (emphasis supplied). The Fourth Circuit recognized this test when it stated, "*Executive Jet* requires . . . a 'significant relationship to traditional maritime activity' to the alleged wrong." (App. 33a).

Having recognized and articulated this test, the Fourth Circuit then proceeded to ignore both the nature of the alleged wrong and its relationship to traditional maritime activity. Instead, the Circuit Court found that it "must examine the function of these shipyard workers in fathoming *their* relationship to maritime commerce and navigation" (App. 34a) (emphasis supplied) and then concluded, "the work done by these shipyards bears a 'significant relationship to traditional maritime activity' because the installation of the asbestos products has a direct effect on marine navigation and commerce." (App. 34a).

To bolster this concept, the Appeals Court then looked to the marketing techniques of some of the defendants and found that "the materials used by these shipyard workers were designed, advertised, and marketed as maritime asbestos products." (App. 35a). This resulted in the further find-

[3] The only marketing information was contained in a proffer by plaintiffs and did not pertain to all defendants.

ing that "when the materials used by these shipyard workers were designed, advertised and marketed as maritime asbestos products, the *Executive Jet* criteria have been met and admiralty jurisdiction should be exercised." (App. 35a).

Rather than look at the nature of the alleged wrong and consider whether the wrong bore any, much less a significant, relationship to traditional maritime activity, the Court below chose to consider the activities of the plaintiffs at the time of their injury (a *worker status* concept) and the manner by which the products were marketed (a *marketing technique* concept). Had the Circuit Court followed the mandate of *Executive Jet*, it would have considered whether the alleged wrong (failure to warn of the potential inhalation hazards of using a product) bore any relationship to a maritime activity. A proper analysis would have compelled a negative conclusion because, as in *Executive Jet*, it was purely fortuitous that the alleged wrong resulted in an injury which may have occurred while working upon navigable waters, as opposed to land.

This result on the important matter of extending admiralty jurisdiction is in conflict with the clearly enunciated decision of *Executive Jet*.

2. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS ON THE SAME MATTER.

In addition to recognizing a nexus requirement for admiralty jurisdiction, *Executive Jet* indicated the circumstances when such jurisdiction might encompass products liability claims.

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules — rules that govern the manner and direction those vessels may

> rightly move upon the waters. *When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe.* Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

409 U.S. at 269, 270 (emphasis supplied).

In extending admiralty jurisdiction to the case at bar, our Court of Appeals cited and relied upon certain decisions from the Fifth and Ninth Circuits in support of its action. Actually, the result achieved below is in conflict with, rather than in harmony with, these other circuits because of a misunderstanding and misapplication of the *Executive Jet* standard.

On the two occasions cited by the Fourth Circuit, the Fifth Circuit has applied admiralty jurisdiction to products liability litigation. *Sperry Rand Corp.* v. *Radio Corp. of America*, 618 F.2d 319 (5th Cir. 1980); *Jig the Third Corp.* v. *Puritan Marine Ins. Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1975), *cert. denied* 424 U.S. 954 (1976). In so doing, that Circuit scrupulously followed *Executive Jet* and found in both instances that the alleged wrong had a significant relationship to a traditional maritime activity, i.e. the marine catastrophe which it caused.

In *Sperry*, a defective component of a gyroscope caused the stranding and collision of a vessel. The Fifth Circuit recognized that nexus is satisfied where this occurs since the wrong has resulted in a marine casualty. 618 F.2d at 321. *Jig the Third* reached the same conclusion. 549 F.2d at 174. There the negligent construction of a vessel resulted in its sinking, another marine casualty.

The Fourth Circuit has likewise cited two Ninth Circuit cases. *Pan-Alaska Fisheries, Inc.* v. *Marine Const. & Design Co.*,

565 F.2d 1129 (9th Cir. 1977); *Jones* v. *Bender Welding & Machine Works, Inc.*, 581 F.2d 1331 (9th Cir. 1978). *Pan-Alaska* made no holding on the appropriateness of admiralty jurisdiction; that issue was neither raised nor discussed. Both cases were consistent with *Executive Jet* because the alleged wrong resulted in vessel damage. *Jones, supra* (defective construction caused breakdown at sea); *Pan-Alaska, supra* (defective construction caused fire and sinking).

By contrast the failure to warn of potential asbestos health hazards in the cases at bar caused no marine casualty, no marine catastrophe, no damage to any vessel. In extending admiralty jurisdiction to the pulmonary disorders resulting from this alleged wrong, the Fourth Circuit directly conflicted with the decisions reached by the Fifth and Ninth Circuits in their proper application of the *Executive Jet* requirements.

3. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS RENDERED AN ERRONEOUS DECISION WHICH WILL HAVE AN IMPACT UPON THOUSANDS OF SIMILAR CASES PENDING IN THE COURTS AROUND THE COUNTRY.

There are currently pending against one or more of these defendant petitioners Fourteen Thousand Three Hundred Ninety Two (14,392) asbestos cases which are not the subject of multi-district consolidation. Of these, Five Thousand Eight Hundred and Twelve (5,812) are shipyard asbestos workers. These cases are pending in virtually every jurisdiction in the country. The trial courts all face the question of whether admiralty jurisdiction applies to their cases. This decision is the only instance of a circuit resolution of this important question.

Unless this Court allows a Writ of Certiorari and corrects the erroneous result in the Court below, it will have an adverse impact on a large volume of litigation. The 5,812 workers who allege any exposure to asbestos hazards upon navigable waters (situs) may have their cases tried according

to the principles of admiralty law; the 8,580 remaining plaintiffs, with no maritime situs, will be adjudicated in the same courts under state law. This important anomaly requires consideration by this Court.

X. CONCLUSION

From the foregoing, it can be clearly seen that if the erroneous interpretation of *Executive Jet* is not corrected, it will have an adverse affect upon substantial litigation throughout the country. Thus, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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XI. APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk and Newport News Divisions

C.P. NO. 77-1

ESTHER BAILEY, ETC., ET AL.,
Plaintiffs

v.

JOHNS-MANVILLE CORP., ET AL.,
Defendants

(AND ALL OTHER CASES)

CIVIL ACTION NOS.

76-155-NN	76-178-NN
77-43-N	77-11-NN
77-135-N	77-273-N
77-298-N	77-328-N
77-365-N	77-456-N
77-457-N	77-463-N
77-68-NN	77-521-N
77-518-N	77-601-N
77-602-N	77-639-N
77-97-N	77-676-N
77-506-N	77-265-N
77-266-N	77-267-N
77-268-N	77-269-N
77-270-N	77-271-N
77-738-N	

MEMORANDUM AND ORDER

In recent months courts all over the country have received a mass of claims from plaintiffs alleging personal injury stemming from exposure to asbestos products.

In the Eastern District of Virginia, at Norfolk, Richmond, and Newport News, there are presently thirty-one such suits encompassing 123 plaintiffs. These numbers increase almost daily. The multiple defendants (in some cases as many as forty-two) can be generally described as the sellers, distributors, and contractors who use or install asbestos products, generally, insulation and pipe coverings.

In addition to the pending federal cases, there are fourteen cases pending in State courts in the area.

To accommodate the massive problems of pretrial procedures, including immense discovery, extreme action was necessary. Chief Judge Kellam of this Court, State Judge McMurran of the Circuit Court of the City of Portsmouth, and State Judge Gill of the Circuit Court of the City of Norfolk, formed a joint action judicial team and with the complete cooperation of attorneys for plaintiffs and defendants, have held joint hearings in which all participating judges sit. A joint pre-trial order, to standardize procedures, applicable to all cases, State and Federal, was hammered out.

The cases have been moving apace. The first federal trial is set for June, 1978, with additional trials docketed for succeeding months. The trial of each suit has been estimated at two weeks or more.

Against this background, the number of pending motions in federal cases have been mounting. A hundred or more motions await action, albeit, most are duplications filed by each of the many defendants in each pending case.

The inherent complexity dictates cautious proceeding, however, many of the pending motions raise issues which are vital in each of the pending matters and demand an early resolution. These questions include whether the cases are to be conducted in accord with the laws of the State of Virginia, or under federal law. At least one primary basis for filing in this federal court has been diversity of citizenship. Is there also admiralty jurisdiction, and thus independent federal jurisdiction as is being claimed by plaintiffs? Is there any other basis for applying federal law as opposed to state law? What Statute of Limitations is to be applied? When, and as construed by what law, does a cause of action accrue?

These pervasive problems, with others, have been briefed at great length and were fully argued here on February 3, 1978. They will be dealt with in separate paragraphs of this Memorandum.

The Court acknowledges the obvious effort and preparation of all counsel. We are grateful for the wealth of the

information provided which bespeaks the fine caliber of counsel in this case.

I

JURISDICTION

In addition to diversity of citizenship [28 U.S.C. §1332(a)(1)], plaintiffs assert various Admiralty and Maritime grounds as jurisdictional bases for their suits. Specifically, plaintiffs lay jurisdiction for their claims under the Admiralty Jurisdiction Extension Act (46 U.S.C. §740), under the Longshoremen's and Harbor Workers' Compensation Act (hereinafter LHWCA) (33 U.S.C. §901, *et seq.*) and under general Admiralty and Maritime Jurisdiction (28 U.S.C. §1333).

(a)

EXTENSION OF ADMIRALTY ACT (Title 46 U.S.C. §740)

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." (First paragraph, 46 U.S.C. §740.)

Almost without exception, the claims in the pending federal cases arise out of employment in the yards of Newport News Shipbuilding & Dry Dock Company; Norfolk Shipbuilding & Drydock Co.; and the Norfolk Naval Shipyard. The exposure to asbestos products is alleged to have

occurred to the individual plaintiffs in the installation of pipe covering and insulation material. No particular vessel, contract or specific time is accused. The general allegations encompass work over a protracted period of time on new construction, repairing of vessels in navigation and out of navigation, work done aboard ships, on piers alongside, and in shops elsewhere in the shipyards.

While the language of the Act extends the provisions thereof only to ". . . cases of damage or injury to person or property, *caused by a vessel* on navigable waters, notwithstanding that such damage or injury be done or consummated on land," nevertheless, *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 83 S.Ct. 1185 (1963); *Garrett* v. *Gutzeit O/Y*, 491 F.2d 228 (4th Cir. 1974), and other authorities have extended jurisdiction under the Extension Act to persons injured on the pier while loading a vessel. Defective bags, which broke during the process of loading in *Gutierrez, supra*, the steel bands on the bales of paper which parted in *Garrett, supra*, were held to be appurtenances of the vessels involved as being cargo containers and defective.

We do not believe, however, that asbestos products sold to a shipyard by a manufacturer and installed by the shipyard upon a ship, new or old, or put on heating or air conditioning pipes in the buildings of the shipyard itself, as to that manufacturer, become appurtenances of a vessel, even if installed on a vessel, within the meaning of *Gutierrez* or *Garrett*. We note no claim in the suits made specifically against a vessel itself, or that the accused asbestos is a maritime appurtenance of that vessel, or that the injury was "caused by a vessel on navigable waters."

The defendants here, manufacturers and distributors of asbestos products, are liable, if at all, on the basis of the hazards of their product, as manufactured, not because it was, or was not, installed on a ship. A tort arising from a hazardous pipe covering material bears no relationship to traditional maritime activity. A furniture manufacturer in

High Point selling desks to a Norfolk Shipyard, would seem not to subject himself to admiralty jurisdiction on the fortuitous circumstance that the desk ended up in the Captain's cabin, as opposed to an office of the Shipyard. "The extension of Admiralty Jurisdiction Statute . . . does not therefore make a classic non maritime, land-based injury into something else!" *Pryor* v. *American President Lines*, 520 F.2d 974, 979 (4th Cir. 1975). The late Judge Craven wrote that to come within the Extension Act there had to be a "proximate cause" relationship between the vessel and the injury, and that such causal connection had to be greater that a "but-for" relationship.

> "There is no indication in the legislative history that Congress intended to go further and extend maritime law to land-based torts where a ship is not at fault, but supplies only a but-for connection with an injury." *Pryor, supra,* at 979.

(b)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Nor do we agree that LHWCA can be a jurisdictional vehicle to have plaintiffs' claims heard in the admiralty side of the Court simply because since 1972 a shipyard employee has been included in an expanded LHWCA.

As a federal compensation act, LHWCA supports only compensation claims, it is not co-exensive with admiralty tort jurisdiction. *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 90 S.Ct. 347 (1969). The boundaries are clearly different, *Stockman* v. *John J. Clark & Son of Boston*, 535 F.2d 264 (1st Cir. 1976). LHWCA is being expanded and yet, and we see later, admiralty jurisdiction is being contracted.

Clearly, compensation acts are to be broadly construed to bring within their reach as many employees as possible.

Their wider scope is a trade off, embodying broader coverage, controlled payments, payment of benefits monthly over a period of time, elimination of defenses normally available to an employer, and payment without fault. Admiralty jurisdiction, on the other hand, is not statutorily established to reach wide perimeters, but encompasses both a situs and a nexus derivative.

(c)

GENERAL ADMIRALTY OR MARITIME JURISDICTION

Executive Jet Aviation, Inc. v. *City of Cleveland, Ohio,* 409 U.S. 249, 93 S.Ct. 493 (1972), restricts general admiralty and maritime jurisdiction. While that case involved the crash of an airplane into the waters of Lake Erie just after it left the runway at the airport in Cleveland, the language of the case is by no means limited to aircraft and their "situs" in or over navigable water.

> "In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test." *Executive Jet Aviation, Inc., supra,* at 501.

The Supreme Court in *Executive Jet Aviation,* at 506, went on to find no significant relationship between the difficulty which occurred, striking a flock of seagulls over the runway, and traditional maritime activity involving navigation and commerce in navigable waters, the *sine qua non* of general admiralty jurisdiction.

While much more could be written, we find no significant relationship between the wrongs here alleged, the hazards of asbestos products applied to pipes and insulation, and "traditional maritime activity involving navigation and commerce in navigable waters."

The Fourth Circuit recognized the implications of *Executive Jet Aviation, Inc., supra,* and added a word about state jurisdiction which is apropos to the case at bar.

> "The Supreme Court [in *Executive Jet Aviation*], of course, did not deal immediately with the problem which confronts us, but it did reject a simplistic locality test. The states, after all, are perfectly capable of resolving such controversies as this out of their existing body of laws, and are currently doing so." *Crosson* v. *Vance,* 484 F.2d 840 (4th Cir. 1973), at 841.

In *Onley* v. *South Carolina Electric & Gas Company,* 488 F.2d 758 (4th Cir. 1973), page 758, the Court said:

> "Whatever the role of the locality test in determining admiralty jurisdiction after *Executive Jet Aviation,* the Supreme Court clearly restricted such jurisdiction by adding the requirement of a nexus to traditionally maritime activity."

Other jurisdictions have illustrated the impact of *Executive Jet Aviation.* A ship construction contract was non maritime in character and a tort claim arising from personal injury during construction was not cognizable in admiralty, *Hollister* v. *Luke Const. Co.,* 517 F.2d 920 (5th Cir. 1975); injuries incurred in an automobile on a floating ferry dock were not a proper subject of admiralty, *Peytavin* v. *Government Employees Insurance Co.,* 453 F.2d 1121 (5th Cir. 1972); and in *Jiles* v. *Federal Barge Lines, Inc.,* 365 F.Supp. 1225 (E.D. La. 1973), Judge Christenberry summed up the state of the law:

> "As recently expounded by the Supreme Court in *Executive Jet Aviation* v. *City of Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed. 454 (1972), merely satisfying the locality test is not sufficient to invoke

maritime jurisdiction. An additional test requires a finding of maritime contacts which constitute a significant relationship between the tort and traditional maritime activity. More specifically, the tort must be of a maritime nature and there must be a relationship between the wrong and some maritime service, navigation or commerce on navigable waters."

We conclude that jurisdiction in this Court rests solely upon diversity of citizenship, 28 U.S.C. §1332(a) (1) and is available only to those plaintiffs which meet the test of that Statute.

II

STATUTE OF LIMITATIONS

We have no difficulty concluding that there is no grounds for admiralty jurisdiction in these cases. It follows, therefore, that absent inherent or statutory grounds for admiralty jurisdiction, this litigation is then before this federal court only on diversity of citizenship and the law of the State of Virginia applies. This includes the Virginia Statute of Limitations, *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), 2 Moore's Federal Practice, 2d Ed., ¶3.07[2], *Guaranty Trust Co. of New York* v. *York*, 327 U.S. 99, 108, 65 S.Ct. 1464, 1469 (1945).

In the Code of Virginia, 1950, Vol. 2 (1977 Replacement Volume), the applicable Statute of Limitations is stated:

> "§8.01-243. — Personal action for injury to a person or property generally. —
>
> "A. Unless otherwise provided by statute, every action for personal injuries, whatever the theory of recovery, except as provided in B hereof, shall be brought within two years next after the cause of action shall have accrued."
>
> [B does not apply here.]

Moreover, the General Assembly of Virginia in 1977, in complete contradiction to two earlier efforts in the Legislature to amend the Virginia Statute to have the right of action accrue from the time of discovery of the personal injury (see page 14 hereof), enacted instead:

> "§8.01-230. — Accrual of cause of action. — In every action for which a limitation period is prescribed, the cause of action shall be deemed to accrue and the *prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person,* when the breach of contract or duty occurs in the case of damage to property *and not when the resulting damage is discovered . . . .* " [Emphasis added.]

We need not pause over the effect of this 1977 enactment on our pre-1977 complaints, since the statute is, in fact, simply a legislative recognition and restatement of the law in Virginia for years prior.

Nor need we debate that the Virginia interpretation of the clause in its statute ". . . after the cause of action shall have accrued," may not be what other courts may have adopted. However, this federal court has no prerogative to indulge in the luxury of its own ideas in the face of the clear statements of the Virginia Legislature and the Virginia judicial view as found in the opinions of the Supreme Court of Virginia.

In *Street* v. *Consumer Mining Corporation,* 185 Va. 561, 39 S.E.2d 271 (1946), an action was brought for the injury and death of a miner caused by the inhalation of silica dust from which he developed silicosis. He died in 1942. His last exposure had been in 1936.

Justice Spratley, for a unanimous court, in sustaining a plea of the statute of limitations, said:

> "The negligent acts charged against the defendant, if committed, were completed and ended before September, 1936, when Street ceased work as a

driller. Prior to his employment with the defendant, Street had worked from 1928 as a driller in the same mine for several former owners.

"Noah Street died October 18, 1942. No action was brought by him during his life for any alleged injuries occasioned him by the defendant. This action was instituted by the administratrix of his estate on September 5, 1944. . . .

"[1] The right of Noah Street to bring an action for his alleged injuries accrued when the wrong was done to him and not at the time of the damage. The foundation of his right was the alleged wrong. *City of Richmond* v. *James*, 170 Va. 553, 567, 197 S.E. 416, 116 A.L.R. 967. Under Virginia Code, 1942, (Michie), section 5818, that right expired at the expiration of one year next after the right to bring the same had accrued.

"[2] The rule that the statute of limitations begins to run from the time of the commission of the wrongful or negligent act is well stated in 17 R.C.L. 764: 'Therefore, as a general rule, where an injury, though slight, is sustained in consequence of the wrongful or negligent act of another and the law affords a remedy therefor the statute of limitations attaches at once. It is not material that all the damages resulting from the act should have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date. The act itself is regarded as the ground of the action and is not legally severable from its consequence. *The statute then begins to run, and not from the time of the damage or discovery of the injury.*' [Emphasis added.] See also 34 Am. Jur, Limitation of Actions, section 160 *et seq.*" *Street, supra,* at 272.

This is the rule also in non-disease cases in Virginia, which are quoted here only to show the continued vitality of *Street, supra,* in the Supreme Court of Virginia.

In *Richmond Development & Housing Authority* v. *Laburnum Const. Corp.*, 195 Va. 827, 80 S.E.2d 574 (1954), Justice Whittle, for a unanimous court, said:

> "Plaintiff argues that there is a recognized exception to these general rules when the cause of action is such that it is 'impossible' of discovery until the occurrence of some event subsequent to its accrual, and that the period of limitation does not, under these circumstances, begin to run until the date of discovery should have, in the exercise of ordinary diligence, been made. . . .
>
> * * * *
>
> "[3] This court, from early times, has adhered to the general rule, which is not controverted by the plaintiff, that the limitation begins to run from the moment the cause of action accrues and not from the time it is ascertained that damage has actually been sustained. McAlexander v. Montgomery, 1832, 4 Leigh 61, 31 Va. 61, citing with approval Wilcox v. Plummer's Ex'rs, 1830, 4 Pet. 172, 7 L.Ed. 821. See also Huston's Adm'r v. Cantril, 1840, 11 Leigh 136, 38 Va. 136; Winston v. Gordon, supra, Culpeper Nat. Bank v. Tidewater Improvement Co., 119 Va. 73, 89 S.E. 118.
>
> "In the cases above cited the existence of the cause of action was equally as difficult of ascertainment as the cause of action in the case at bar. The difficulty in ascertaining the fact that a cause of action exists plays no part in the general rule.
>
> "In the comparatively recent case of Street v. Consumers Mining Corp., 1946, 185 Va. 561, 39 S.E.2d 271, 272, 167 A.L.R. 886, Noah Street, the plaintiff's intestate, had been employed in the defendant's mine. The wrongful conduct of the defendant in providing him an unsafe place in which to work caused him to have a fatal disease. The wrongful conduct occurred before 1936 and the disease was not discovered until 1940. *Before decedent knew he had a cause of action it had been barred by the statute of limitations.* [Emphasis added.] The disease caused his death in 1942, and this action was

brought for wrongful death. But the death, which was a consequence of the original wrongdoing of the defendant was not a new cause of action. Hence the cause of action was completely barred by the statute of limitations before Street died. . . .

* * * *

". . . Therefore the general rule, where an injury, though slight, is sustained in consequence of the wrongful or negligent act of another and the law affords a remedy therefore the statute of limitations attaches at once. It is not material that all the damages resulting from the act should have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date. The act itself is regarded as the ground of the action and is not legally severable from its consequence. The statute then begins to run, and not from the time of the damage or discovery of the injury.' (185 Va. at page 566 [39 S.E.2d at page 272])." (At 580, 581.)

And in *Hawks* v. *DeHart*, 206 Va. 810, 146 S.E.2d 187 (1966), Justice Buchanan, for a unanimous court, wrote:

"[1] We are committed in Virginia to the rule that in personal injury actions the limitation on the right to sue begins to run when the wrong is done and not when the plaintiff discovers that he has been damaged." (At 189.)

And more recently, Justice Cochran, again for a unanimous court, in *Comptroller of Virginia ex rel. Virginia Military Institute* v. *King*, Va. , 232 S.E.2d 895 (1977), said:

"[4] We have followed the general rule that the applicable period of limitation begins to run from the moment the cause of action arises rather than from the time of discovery or injury or damage, and we have said that difficulty in ascertaining the existence of a cause of action is irrelevant. . . .

* * * *

"The inequities that may arise from the general rule which may trigger a statute of limitations when the injury or

damage *is unknown or difficult or even incapable of discovery are apparent. See Insurance Co. of No. America* v. *General Electric Co.*, 376 F.Supp. 638 (W.D. Va. 1974). [Emphasis added.] Nevertheless, we believe that any change in a rule of law that has been followed in our jurisdiction and relied on by the bench and bar for so many years should be made not by us, but by the General Assembly, which thus far has not approved any modification."

The plaintiffs cite *Barnes* v. *Sears Roebuck & Co.*, 406 F.2d 859 (4th Cir. 1960); *Sides* v. *Richard Machine Works, Inc.*, 406 F.2d 445 (4th Cir. 1969); and *Caudill* v. *Wise Rambler, Inc.*, 210 Va. 11, 168 S.E.2d 257 (1969), but we view those cases as inapposite.

In *Barnes*, the negligence and defect in the bicycle occurred at sale, but the statute of limitations did not begin to run as to Barnes until his cause of action arose, *i.e.*, when he was thrown from the bicycle and injured.

In *Sides*, the locomotive was defective in design at its sale in 1958, but Sides' cause of action did not arise until he was injured in 1966.

In *Caudill*, the automobile was defective at sale, but no personal injury cause of action arose to Mrs. Caudill until the defect in the steering mechanism threw the car off the road and she was injured.

In none of these cases had the plaintiffs been injured nor did the cause of action accrue until the impact of the accident which occurred. On the other hand, in disease type cases in Virginia, the "right . . . to bring an action for . . . injuries accrued when the wrong was done . . . and not at the time of damage." *Street, supra*, at 272.

Efforts to amend 8-24 Code of Virginia, now 8.01-243, to make the statute run from the time of discovery of the injury have been instituted in the Virginia General Assembly, but have failed. *See Insurance Co. of No. America* v. *General Electric Co.*, 376 F.Supp. 638 (W.D. Va. 1974), footnote 3, at page 642.

The federal rule running the statute of limitations from the date of discovery of the damage which is to be applied under circumstances warranting its application is not in accord with the State law in Virginia. Hence the decisions in *Urie* v. *Thompson*, 337 U.S. 163, 69 S.Ct. 1018 (1949), a suit under the Federal Employees Liability Act, 45 U.S.C. §51, *et seq.*; *Young* v. *Clinchfield Railroad Company*, 288 F.2d 499 (4th Cir. 1961), brought under the same Federal Employees Liability Act, and *Bridgeford* v. *United States*, F.2d (4th Cir. 1977), a suit under the Federal Tort Claims Act, apply the federal rule, not the Virginia rule, and are inapplicable. Title 28 U.S.C. §1346(b). In construing the law that the claim in *Bridgeford* had to be presented ". . . within two years after such claim accrues . . .," Judge Craven made the precise point that the accrual point of the federal claim was governed by federal law.

So also in *Karjala* v. *Johns-Manville Products Corporation*, 523 F.2d 155 (8th Cir. 1975), Judge Webster, in holding to a "manifestation" of damage rule as the beginning of the limitations period, was applying the Minnesota standard, in a Minnesota diversity case.

And in *Borel* v. *Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), on the limitations question, the Court applied Texas law, in a diversity case.

In the case at bar, we are called to the Virginia standard in this diversity action. We conclude that the two year Statute of Limitations began to run upon the last exposure of a plaintiff to the accused asbestos product.

III

STRICT LIABILITY IN TORT

At the present time the Supreme Court of Virginia has indicated that an action for personal injury, caused by a

breach of warranty, should be based on contract and not on strict liability in tort, *Matthews* v. *Ford Motor Co.*, 479 F.2d 399 (4th Cir. 1973), footnote 2, page 401, *Briggs* v. *Zotos International, Inc.*, 357 F.Supp. 89, 92 (E.D. Va. 1973).

The Virginia approach as distinguished and contrasted to strict liability in tort is fully discussed by Richard E. Spiedel, then Associate Professor of Law at the University of Virginia, in his article entitled, "The Virginia Anti-Privity Statute; Strict Products Liability under the Uniform Commercial Code," published in Vol. 51 Virginia Law Review, page 804 (1965).

Action to strike the counts in the several complaints which proceed on strict liability, however, need not be pursued at this time, but can await the trials of the individual actions.

Likewise, the issue of whether punitive damages are recoverable in a suit under the Virginia Wrongful Death Act has been decided by the Supreme Court of Virginia in *Wilson* v. *Whitaker*, 207 Va. 1032, 154 S.E.2d 124 (1967), in which Justice Snead wrote that "[T]he right of action for damages for personal injuries, including punitive damages, if any, expires upon the death of the injured person. Our death by wrongful act statute does not cause to survive this right of action, but it creates in the decedent's personal representative a new right of action. . . . If the General Assembly had intended that punitive damages might be recovered, it could have specifically provided for such damages. . . . We hold that there can be no recovery of punitive damages in an action for wrongful death under our statute."

In its rewriting in 1974 to its present codification in 8.01-52, Code of Virginia, 1950, there is still no language to gainsay Justice Snead in *Wilson* v. *Whitaker, supra.*

We agree with Judge McMurran, in his letter ruling dated January 19, 1977, that any question of the applicability of *res ipsa loquitor*, being essentially an evidentiary matter, should properly await trial.

Additionally, averments of fraudulent concealment as a mode of tolling an applicable Statute of Limitations are a matter of evidentiary proof. The defendants are entitled to the information upon which plaintiffs rely. However, since discovery is being pursued in great detail, it would appear that defendants who complain of insufficient information might satisfy themselves by resort to discovery in this area. In a case such as this with defendants in a single case ranging all the way up to forty-two in number, a broadly stated fraud count certainly does not apply to all. Sooner or later, and before trial, plaintiffs are going to have to reveal the evidence upon which they will rely, and as to which specific defendants.

It seems apparent that under Virginia law a wife may not recover in an action where her husband has been negligently injured by a third party for loss to the wife of the services and companionship of the husband occasioned by the injuries. *Carey* v. *Foster*, 221 F.Supp. 185 (E.D. Va. 1963), *affirmed* 345 F.2d 772 (4th Cir. 1965). Virginia is a common law state, except where modified by statute, and at common law no right of consortium was ever vested in the wife. The language of the Code of Virginia, 1950, §55-36, giving a wife the right to sue in her own name, did not confer upon her the right to sue in her name for lack of consortium due to injuries to the husband; 9 Michie's Jurisprudence, *Husband and Wife* §96 (1977).

However, such a ruling can be made, on motion, in the several separate actions, and is not here directed to any pending cause.

We do not act here upon the motions to sever. The Court, upon motion, will consider the matter of severance as the cases arise for trial.

The rulings herein made, in the opinion of this Court, involve controlling questions of law as to which there are substantial grounds for differences of opinions and an immediate appeal from the Order entered in connection with this Memorandum may materially advance the ultimate termination of many complaints in this litigation.

United States District Judge

Norfolk, Virginia
March 30, 1978.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk and Newport News Divisions

C.P. NO. 77-1
CIVIL ACTION NOS.

ESTHER BAILEY, ETC., ET AL.,	76-155-NN	76-178-NN
Plaintiffs	77-43-N	77-11-NN
	77-135-N	77-273-N
v.	77-298-N	77-328-N
JOHNS-MANVILLE CORP., ET AL.,	77-365-N	77-456-N
Defendants	77-457-N	77-463-N
	77-68-NN	77-521-N
(AND ALL OTHER CASES)	77-518-N	77-601-N
	77-602-N	77-639-N
	77-97-N	77-676-N
	77-506-N	77-265-N
	77-266-N	77-267-N
	77-268-N	77-269-N
	77-270-N	77-271-N
	77-738-N	

ORDER

In accord with a Memorandum this day filed, it is ORDERED:

(1) that this litigation being before the Court on diversity of citizenship, the laws of the State of Virginia shall apply;

(2) that there is no independent or statutory federal jurisdiction, in admiralty or otherwise;

(3) that the applicable statute of limitation is that of the State of Virginia; that claims brought more than two years after the last exposure to asbestos products are, under the Virginia Statute of Limitations, barred;

(4) that those counts proceeding on grounds of strict

liability in tort will be stricken as being contrary to the law of Virginia;

(5) that the recovery of punitive damage under the Virginia Wrongful Death Act, appears to be contrary to Virginia law, but an affirmative Order so holding is not here entered, but will be acted upon prior to trial in each separate action in which it may be an issue;

(6) that the right of a wife to recover for her loss of consortium by reason of the injury to her husband appears to be contrary to Virginia law, but an affirmative Order precluding such recovery is not here entered, but will be considered prior to trial in each separate suit in which it may be an issue; and

(7) that severability of claims will be considered, appropriately in advance of trial, in separate cases.

The rulings herein made, in the opinion of this Court, involve controlling questions of law as to which there are substantial grounds for differences of opinions and an immediate appeal from this Order may materially advance the ultimate termination of many complaints in this litigation.

It is so ORDERED.

United States District Judge

Norfolk, Virginia
March 30, 1978.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-1854

John W. White,

Appellant,

and

Ronald M. Cash, Donahue Ellis, Willie A. Gibbons, Thomas J. Hogge, Maurice W. Holloway, Wilson W. Jones, Percy C. Overman, Hugh V. Reynolds, John Lee Roland, Thomas R. Sawyer, Milton L. Stacey, Robert L. Van Dyke, Walter J. White, James T. Long, Homer E. Watson, O.W. Patrick, James T. Oman, Fred R. Walker, Roscoe C. McGuire, Elias James Watkins,

Plaintiffs,

v.

Johns-Manville Corporation, and Johns-Manville Sales Corporation, successor by merger with Johns-Manville Products Corporation; Raybestos-Manhattan Corporation, a Connecticut Corporation; Owens-Corning Fiberglas Corporation, successor by purchase of Kaylo Division of Owens-Illinois Glass Company; Pittsburgh Corning Corporation, a Pennsylvania Corporation; The Celotex

Corporation, successor by merger with Panacon Corporation, which was successor by merger of Briggs Manufacturing Company and Philip Carey Corporation; Unarco Industries, Inc., formerly known as Union Asbestos and Rubber Company; H.K. Porter Company, Thermoid Division, a Delaware Corporation; Southern Asbestos Company, a foreign corporation; Eagle-Picher Industries, Inc., an Ohio Corporation,

Appellees,

v.

Newport News Shipbuilding and Drydock Company and United States of America,

Third-Party Defendants.

No. 80-1028

John W. White, Ronald M. Cash, Donahue Ellis, Thomas J. Hogge, Maurice W. Holloway, Wilson W. Jones, Percy C. Overman, John Lee Roland, Thomas R. Sawyer, Milton L. Stacey, Robert L. Van Dyke, Walter J. White, James T. Long, Homer E. Watson, O.W. Patrick, Roscoe C. McGuire, Elias James Watkins,

Plaintiffs,

and

Willie A. Gibbons, Hugh V. Reynolds, James T. Oman, Fred R. Walker,

Appellants,

v.

Johns-Manville Corporation and
johns-Manville Sales Corporation,
successor by merger with Johns-Manville
Products Corporation; Raybestos-Manhattan,
a Connecticut Corporation; Owens-Corning
Fiberglas Corporation, successor by
purchase of Kaylo Division of Owens-Illinois
Glass Company; Pittsburgh Corning Corporation,
a Pennsylvania Corporation; The Celotex
Corporation, successor by merger with Panacon
Corporation, which was successor by merger of
Briggs Manufacturing Company and Philip Carey
Corporation; Unarco Industries, Inc.,
formerly known as Union Asbestos and Rubber
Company; H.K. Porter Company, Thermoid Division,
a Delaware Corporation; Southern Asbestos
Company, a Foreign Corporation; Eagle-Picher
Industries, Inc., an Ohio Corporation,

Appellees,

v.

Newport News Shipbuilding and Drydock
Company and The United States of America,

Third-Party
Defendants.

No. 80-1140

James T. Oman, Fred R. Walker,
John W. White, Willie A. Gibbons,
Hugh V. Reynolds,

Appellants,

and

Ronald M. Cash, Donahue Ellis,
Thomas J. Hogge, Maurice W. Holloway,

Wilson W. Jones, Percy C. Overman, John Lee Roland, Thomas R. Sawyer, Milton L. Stacey, Robert L. Van Dyke, Walter J. White, James T. Long, Homer E. Watson, O.W. Patrick, Roscoe C. McGuire, Elias James Watkins,

Plaintiffs,

v.

Johns-Manville Corporation and Johns-Manville Sales Corporation, successor by merger with Johns-Manville Products Corporation; Raybestos-Manhattan Corporation, a Connecticut Corporation; Owens-Corning Fiberglas Corporation, successor by purchase of Kaylo Division of Owens-Illinois Glass Company; Pittsburgh Corning Corporation, a Pennsylvania Corporation; The Celotex Corporation, successor by merger with Panacon Corporation, which was successor by merger of Briggs Manufacturing Company and Philip Carey Corporation; Unarco Industries, Inc., formerly known as Union Asbestos and Rubber Company; H.K. Porter Company, Thermoid Division, a Delaware Corporation; Southern Asbestos Company, a Foreign Corporation; Eagle-Picher Industries, Inc., an Ohio Corporation,

Appellees,

v.

Newport News Shipbuilding and Drydock Company and The United States of America,

Third-Party Defendants.

No. 80-1154

James T. Oman, Fred R. Walker,
Willie A. Gibbons, Hugh V. Reynolds,

Appellees,

and

John W. White, Ronald M. Cash, Donahue
Ellis, Thomas J. Hogge, Maurice W. Holloway,
Wilson W. Jones, Percy C. Overman, John Lee
Roland, Thomas R. Sawyer, Milton L. Stacey,
Robert L. Van Dyke, Walter J. White,
James T. Long, Homer E. Watson, O.W. Patrick,
Roscoe C. McGuire, Elias James Watkins,

Plaintiffs,

v.

Johns-Manville Corporation and
Johns-Manville Sales Corporation,
successor by merger with Johns-Manville
Product Corporation,

Appellant,

and

Raybestos-Manhattan Corporation, a
Connecticut Corporation; Owens-Corning
Fiberglas Corporation, successor by
purchase of Kaylo Division of Owens-
Illinois Glass Company; Pittsburgh Corning
Corporation, a Pennsylvania Corporation;
The Celotex Corporation, successor by
merger with Panacon Corporation, which was
successor by merger of Briggs Manufacturing
Company and Philip Carey Corporation;
Unarco Industries, Inc., formerly known
as Union Asbestos and Rubber Company;
H.K, Porter Company, Thermoid Division,

successor by merger with Johns-Manville Products Corporation; Raybestos-Manhattan Corporation, a Connecticut Corporation; Owens-Corning Fiberglas Corporation, successor by purchase of Kaylo Division of Owens-Illinois Glass Company; Pittsburgh Corning Corporation, a Pennsylvania Corporation, The Celotex Corporation, successor by merger with Panacon Corporation, which was successor by merger of Briggs Manufacturing Company and Philip Carey Corporation; Unarco Industries, Inc., formerly known as Union Asbestos and Rubber Company; Southern Asbestos Company, a Foreign Corporation; Eagle-Picher Industries, Inc., an Ohio Corporation,

Defendants and Third-Party Plaintiffs,

v.

Newport News Shipbuilding and Drydock Company and The United States of America,

Third-Party Defendants.

No. 80-1228

James T. Oman, Fred R. Walker, Willie A. Gibbons, Hugh V. Reynolds,

Appellees,

and

John W. White, Ronald M. Cash, Donahue Ellis, Thomas J. Hogge, Maurice W.

Holloway, Wilson W. Jones, Percy C. Overman, John Lee Roland, Thomas R. Sawyer, Milton L. Stacey, Robert L. Van Dyke, Walter J. White, James T. Long, Homer E. Watson, O.W. Patrick, Roscoe C. McGuire, Elias James Watkins,

Plaintiffs,

v.

Owens-Corning Fiberglass Corporation, successor by purchase of Kaylo Division of Owens-Illinois Glass Company,

Appellant,

and

Johns-Manville Corporation and Johns-Manville Sales Corporation, successor by merger with Johns-Manville Products Corporation; Raybestos-Manhattan Corporation, a Connecticut Corporation; Pittsburgh Corning Corporation, a Pennsylvania Corporation; The Celotex Corporation, successor by merger with Panacon Corporation, which was successor by merger of Briggs Manufacturing Company and Philip Carey Corporation; Unarco Industries, Inc., formerly known as Union Asbestos and Rubber Company; Southern Asbestos Company, a Foreign Corporation; Eagle-Picher Industries, Inc., an Ohio Corporation,

Defendants and Third-Party Plaintiffs,

v.

Newport News Shipbuilding and Drydock Company and The United States of America,

Third-Party Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. J. Calvitt Clarke, Jr., District Judge.

Argued: November 11, 1980 Decided: October 5, 1981

Before WIDENER, HALL and PHILLIPS, Circuit Judges.

Joel I. Klein (H. Bartow Farr, III, Susan L. Carney, Rogovin, Stern & Huge; Robert R. Hatten, Patten & Wornom; Richard S. Glasser, Glasser and Glasser; Gene Locks on brief) for Appellants; Robert M. Hughes, III (C. Michael Montgomery, Glen A. Huff, Steven G. Schwartz, Seawell, McCoy, Dalton, Hughes, Gore and Timms on brief) for Johns-Manville Cor-

poration and Johns-Manville Sales Corporation; Archibald Wallace, III (Albert D. Bugg, Jr., Sands, Anderson, Marks & Miller on brief) for H.K. Porter Company, Inc. and Southern Textile Corporation; (Jack E. Greer, J. Anderson Stalnaker, Williams, Worrell, Kelly and Greer on brief) for Owens-Corning Fiberglas Corporation; (Allan S. Reynolds, Worth D. Banner, White, Reynolds, Smith & Winters on brief) for Pittsburgh Corning Corporation; (John Y. Pearson, Jr., Bruce T. Bishop, Guy R. Friddell, III, Willcox, Savage, Lawrence, Dickson & Spindle on brief) for Celotex Corporation; (William B. Eley, Kenneth A. Phillips, Eley, Rutherford & Leafe on brief) for Eagle-Picher Industries, Inc.; (Gerard E.W. Voyer, Taylor, Walker & Adams on brief) for Unarco Industries, Inc.; (William V. Hoyle, Charles A. Smith, Philip S. Payne, Hoyle, Corbett, Hubbard, Smith and Payne on brief) for Raybestos-Manhattan, Inc.

HALL, Circuit Judge:

John W. White and four other shipyard workers of the Newport News Shipbuilding and Dry Dock Company appeal the judgments of the district court setting aside jury verdicts of $435,000 for each employee and granting judgment *n.o.v.* in favor of various manufacturers of asbestos products. Appellants raise these main issues on appeal: (1) whether the district court erred in denying admiralty jurisdiction; (2) whether the court properly applied Virginia law in determining when their causes of action accrued; (3) whether the court's rulings and instructions on damages were incorrect; and (4) whether the court properly set aside the jury verdicts.

We agree with the appellants that the court should have exercised its admiralty jurisdiction. Therefore, we vacate the judgments of the district court and remand for further proceedings.

I. Background

John W. White, James T. Oman, Fred R. Walker, Hugh V. Reynolds, and Willie A. Gibbons were shipyard workers for Newport News Shipbuilding and Dry Dock Company (Newport News). In the course of their lengthy employments, they worked with asbestos insulation materials in the construction and repair of numerous ships and ocean-going vessels.[1] As a result of exposure to asbestos dust and fibers, these workers developed asbestosis, a severely debilitating lung disease usually characterized by shortness of breath, sharply recurring chest pains, and a deterioration and scarring of the lung tissue. There is no known cure for this condition, and the symptoms normally increase in their intensity and disabling effect.

Following extensive discovery efforts by counsel, the district court consolidated these cases and issued three separate, dispositive rulings. In the first of these orders, the court on March 30, 1978, declined to assert admiralty juridiction and rejected claims under the Extension of Admiralty Act, 46 U.S.C. §740, or the general maritime law, 28 U.S.C. §1333, because the alleged injuries bore no reasonable relationship to traditional maritime activity. Pursuant to its diversity jurisdiction, the court then held that the applicable Virginia two-year statute of limitations for personal injury[2] began to run as of the date of last exposure to asbestos, so that any claims over two years old were barred.

The second disputed order is that of December 10, 1979, in which the district court, referring to its March, 1978, rul-

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[1] White alleged that his last exposure to these asbestos products was in November, 1974, which was more than two years before his suit was initiated. The other shipyard workers claimed that they were continually exposed to asbestos materials until a time within the two-year period preceding the dates on which their respective complaints were filed.

[2] The district court held that the applicable statute of limitations for personal injury was set forth in Va. Code §8.01-243 (1977 Replacement Volume).

ing, limited any recoverable damages to only those "injuries which occurred during the period commencing at a date two years before the institution of each plaintiff's action and ending at the date of last exposure." The court also restricted the use of evidence of exposure prior to this period to prove only the identity of the manufacturers which furnished asbestos products used by the employees.

On the first day of trial on November 13, 1979, the court granted summary judgment in favor of the manufacturers against White since his claims were outside of the two-year limitation period. Thereafter, several summary judgment orders were entered in favor of some of the manufacturers as to certain plaintiffs. On December 14, 1979, the jury returned a verdict in favor of Oman, Walker, Reynolds, and Gibbons in the amount of $435,000 for each employee as follows:

Oman v. Johns-Manville and Owens-Corning;

Walker v. Johns-Manville, Owens-Corning, and Pittsburgh Corning;

Reynolds v. H.K. Porter Co., Inc.; and

Gibbons v. Johns-Manville.

The third contested order is that of January 31, 1980, wherein the district court granted the manufacturers' motion for judgment *n.o.v.* and entered judgment in favor of the appellees. The court's rationale for this action was that the employees had failed to adequately prove the extent of any injuries during the two-year limitation period and that the jury verdicts were "shockingly excessive" in light of the actual evidence introduced at trial. After the employees' motions to reconsider were denied, this consolidated appeal was timely filed. The manufacturers have challenged certain evidentiary rulings made during trial in their cross-appeal.

II. Admiralty Jurisdiction

The principal issue confronting us on appeal is whether the district court should have exercised its inherent admiralty jurisdiction in these products liability cases. All parties agree that the decision in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972), sets forth the controlling criteria for determining whether a tort action is "maritime" and thus within the admiralty jurisdiction of the federal courts. The two-part test of *Executive Jet* requires (1) a maritime locality of the injury, and (2) a "significant relationship to traditional maritime activity" to the alleged wrong. *Id.* at 268. Thus, a plaintiff must satisfy both the maritime locality and "nexus" requirements to invoke the admiralty jurisdiction of the district court.

While the exercise of admiralty jurisdiction must be confined to matters of maritime commerce and navigation, regardless of the maritime situs of the injury, there is growing authority and precedent among the federal courts that products liability actions are cognizable under admiralty law when the *Executive Jet* criteria are met. In *Pan-Alaska Fisheries, Inc.* v. *Marine Construction & Design Co.*, 565 F.2d 1129 (9th Cir. 1977), the court, applying *Executive Jet*, held that a products liability claim for personal injury against the manufacturer of a marine diesel engine with a defective fuel filter was properly within admiralty jurisdiction. Accord, *Jones* v. *Bender Welding & Machine Works, Inc.*, 581 F.2d 1331 (9th Cir. 1978); *Jig the Third Corp.* v. *Puritan Marine Insurance Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976); 1 Benedict on Admiralty §188 (7th ed. 1974).[1]

In the present case, the plaintiff employees alleged in their complaint that they had installed asbestos insulation

[1] Admiralty jurisdiction of products liability actions was also recognized in the pre-*Executive Jet* decision in *Schaeffer* v. *Michigan-Ohio Navigation Co.*, 416 F.2d 217 (6th Cir. 1969).

materials during ship construction and repair in the course of their employment with Newport News. Their work was performed at both the shipyard and dry dock areas as well as aboard the vessels while they were located on navigable waters. Thus, the allegations would meet the locality test of *Executive Jet*.

We must next determine whether the factual circumstances surrounding the employees' injuries satisfy the maritime "nexus" requirement. In *Executive Jet* the Supreme Court simply held that an aircraft which fell into navigable waters did not have a sufficient relationship to maritime activity to trigger admiralty jurisdiction. The opinion of the Court gives no indication as to what actual activities would satisfy the maritime "nexus" test. Hence, we must examine the function of these shipyard workers in fathoming their relationship to maritime commerce and navigation.

As already stated, each of these employees spent a significant part of his working career in the fabrication and replacement of various types of asbestos insulation materials for use on public and private ships. Without such shipyard efforts, these vessels would have been unable to perform their maritime role as carriers of people and cargo. Thus, installation of insulation materials, which by their very nature become an appurtenance, or integral part, of the ship, is clearly essential to the maritime industry. Therefore, the work done by these shipyards bears a "significant relationship to traditional maritime activity" because the installation of the asbestos products has a direct effect on marine navigation and commerce.

We disagree with the manufacturers' contention that a finding of admiralty jurisdiction in these cases would extend such jurisdiction to include the production of any item which finds its way into a maritime environment. The manufacturers' argument that admiralty jurisdiction does not exist in products liability cases where the allegedly defective or

hazardous product is not unique to maritime use is inapposite, since the evidence presented at trial clearly established that the materials used by these shipyard workers were designed, advertised, and marketed as maritime asbestos products. Hence, it was quite foreseeable by the manufacturers that these materials would be primarily sold and fabricated for use on ships. While at least one other federal appellate court has seemingly applied admiralty law to a products liability case where the defective component was not limited to maritime use, *Sperry Rand Corp.* v. *Radio Corporation of America*, 618 F.2d 319 (5th Cir. 1980), we today only hold that under the circumstances of these cases, when the materials used by these shipyard workers were designed, advertised and marketed as maritime asbestos products, the *Executive Jet* criteria have been met and admiralty jurisdiction should be exercised.[4]

III. Accrual of Cause of Action

The district court, relying primarily on *Street* v. *Consumer Mining Corp.*, 185 Va. 561, 39 S.E.2d 271 (1946), and its progeny,[5] ruled in its order of March 30, 1978, that each employee's cause of action accrued as of the date of last exposure to asbestos products. This interpretation of the Virginia statute of limitations has since been held by the Virginia Supreme Court to not apply to plaintiffs afflicted with mesothelioma.[6] *Locke* v. *Johns-Manville Corp.*, Va. , 275

[4] Since we find that jurisdiction is present under 28 U.S.C. §1333, we need not address whether jurisdiction also exists under the Extension of Admiralty Act, 46 U.S.C. §740.

[5] *E.g.*, *Richmond Development & Housing Authority* v. *Laburnum Construction Corp.*, 195 Va. 827, 80 S.E.2d 574 (1954); *Hawks* v. *DeHart*, 206 Va. 810, 146 S.E.2d 187 (1966); and *Comptroller of Virginia ex rel. Virginia Military Institute* v. *King*, 232 S.E.2d 895 (Va. 1977).

[6] In *Locke*, the court found that a cause of action for mesothelioma purportedly arising from asbestos exposure accrues on the date the cancerous tumor forms rather than on the date of last exposure. Slip. Op. 8.

S.E.2d 900 (1981). However, because this case falls within admiralty jurisdiction, the equitable doctrine of laches applies rather than the statute of limitations. In admiralty suits involving personal injury, this Court has held that while Federal courts may look to the parallel statute of limitations of the forum state for initial guidance, such statutes alone do not determine the existence of unreasonable delay. In this case, the insidious nature of the disease should also be given consideration. In addition, the defendant still bears the burden of proving inexcusable or inadequately excused delay plus prejudice since laches is an affirmative defense under Rule 8(c), Federal Rules of Civil Procedure. *Giddens* v. *Isbrandtsen Co.*, 355 F.2d 125 (4th Cir. 1966). *See also, Ashland Oil, Inc.* v. *Madison Coal & Supply Co., Inc.*, 461 F.Supp. 997 (S.D. W. Va. 1978); *White* v. *Lundeberg Maryland Seamanship School, Inc.*, 57 F.R.D. 128 (D. Md. 1972). The procedure to be followed by the district court is definitively set forth in *Giddens, supra*, at 128.

We do not reach the merits of the issue of laches in this case inasmuch as the district court must first determine how far back the applicable exposure period for each employee should be extended. Upon determining the relevant periods involved for each shipyard worker, the lower court must ascertain which manufacturers are proper party defendants for each plaintiff and then take steps to reinstate the relevant parties before the court.

IV. Damages

In its order of December 10, 1979, the court applied the Virginia two-year statute of limitations for personal injury to determine each employee's relevant period for which damages might be recovered. This resulted in complete summary judgment against White and severely limited the potential recovery of the remaining plaintiffs. Moreover, in his jury charge on the issue of damages, the trial judge instructed the jurors that each plaintiff's recovery was only for "contracted

asbestosis from exposure in a particular period of time to asbestos, which is in addition to that asbestosis which he already had previously contracted. The defendants are not liable for any asbestosis contracted prior to the periods involved or for any symptoms resulting from such asbestosis."

After the jury answered the special verdict forms in favor of each employee in the amount of $435,000, the court granted judgment *n.o.v.* because under Virginia law each plaintiff had not presented sufficient evidence "to prove with reasonable certainty the proportional amount of his damages attributable to each [contributing] cause." The court found this rule of state law to be "particularly significant in these cases where each of the plaintiffs entered the relevant time periods with pre-existing asbestos-related infirmities."

The instruction that the manufacturers were not legally accountable for any asbestosis incurred prior to the designated relevant periods of exposure for each employee is a correct statement of the law. However, it is also well-established tort law that a negligent defendant may be liable for any aggravation of a pre-existing condition. This includes a concealed physical condition, such as a latent disease, and this is so even though such defendant was in no way responsible for the pre-existing condition. Prosser, *Law of Torts* §43 (4th ed. 1971). While the jury could not properly award damages against the manufacturers for prior exposure-related injuries, it could find from the medical evidence presented at trial that the plaintiffs were diseased by exposures to the asbestos products prior to the relevant periods and that such condition was so aggravated as to cause asbestosis or an exacerbation of asbestosis.

V. Conclusion

Because we find that the exercise of admiralty jurisdiction is proper under the test established in *Executive Jet*, the application of Virginia's two-year limitation period to the

employees' claims was error. Therefore, the judgments entered in these cases, or affected by our present disposition of this appeal, must be vacated and a new trial conducted under the admiralty jurisdiction of the federal court.[7]

VACATED AND REMANDED

WIDENER, Circuit Judge, concurring:

While I agree with the majority that admiralty jurisdiction attaches to the appellants' claims, I believe that certain aspects of that decision require more explanation.

The first involves the conclusion that the locality component of the test enunciated in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 245 (1972), has been met. We have recently held, in *Holland* v. *Sea-Land Service, Inc.*, F2d , No. 80-1647/1648 (4th Cir. 1981), that an action sounding in tort is ". . . only cognizable under traditional admiralty jurisdiction if (1) the wrong occurred on navigable waters and (2) bore a significant relationship to a maritime activity." *Holland*, supra, sl. op. at 5. The district court made no finding as to the situs of the wrong in this case. In the present opinion, the court notes only that the situs requirement is satisfied by allegations in the complaint of injury both on navigable waters and on land.

I note that in their affidavits the plaintiffs claim that at least 90% and as much as 97% of their exposure to the manufacturers' products occurred on navigable waters. Given this overwhelming predominance of exposure arising in the proper maritime situs, and especially taking into account that no issue has been made of the extent of the exposure on navigable waters, I would agree that the entirety of the plaintiffs' tort claims are properly cognizable in admiralty. Our decision should not, however, be read to imply a similar rule

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[7] Those remaining issues raised on appeal regarding the effect of the two-year limitation period on the burden of proof relating to injuries and damages, as well as the challenges to evidentiary rulings raised on cross-appeal, have become moot and are not addressed in light of our disposition of the primary issues of this consolidated appeal.

in all cases in which there is exposure to injury both on land and on navigable waters.

I am troubled by the fact that the majority addresses its analysis solely to the question of admiralty jurisdiction over claims sounding in tort. The plaintiffs' complaints in this case generally assert claims based upon the manufacturers' failure to warn of the dangers of the asbestos-based products and upon the breach of an implied warranty that such products were fit for their intended use. While the court's analysis of admiralty jurisdiction over torts is clearly applicable to the former claims, its application to the latter is doubtful if applicable at all.

In its order of September 13, 1979, in the related case of *Johns-Manville Corporation, et al* v. *United States,* No. 78-648-N (E.D. Va. December 21, 1979), the district court held that a claim of breach of an implied warranty sounded in contract rather than in tort. This aspect of the district court's order was not challenged by the parties on appeal, and, in fact, formed a basis of our opinion in that case, *Johns-Manville Corporation et al* v. *United States,* F2d , No. 80-1085 (4th Cir. 1981), as well as in *White* v. *Johns-Manville,* F2d No. 80-1116 (4th Cir. 1981).

If we accept that characterization as correct, it is clear that the *Executive Jet* test defining the extent of admiralty jurisdiction over tort claims is inapplicable here. While similar to that test, the question of the existence of admiralty jurisdiction over a contractual claim is decided upon a determination of whether the contract is maritime in nature. See *Kossick* v. *United Fruit Company,* 365 U.S. 731 (1961); *Sanderlin* v. *Old Dominion Stevedoring Corporation,* 385 F2d 79 (4th Cir. 1967); *Ford Motor Company* v. *Wallenius Lines, M/V Atlantic Cinderella,* 476 F.Supp. 1362 (E.D. Va. 1979). Our opinion fails to apply this test to the plaintiffs' implied warranty claims.

There is, however, a great similarity between the significant relationship with maritime activity required under *Ex-*

ecutive Jet and the question of the existence of a maritime contract. In light of our finding that the tort claims in this case have a sufficient nexus with a maritime activity to support admiralty jurisdiction, I believe that the claims on implied warranties arising in the same factual setting must be considered to be maritime in nature. Therefore, I agree that the plaintiffs' claims, whether sounding in tort or in contract, are cognizable in admiralty.

I do not agree with the majority opinion as it describes the plaintiffs' claims as cognizable in a court of admiralty pursuant to its "inherent jurisdiction." S1. op. p. 12. I do not believe that inferior federal courts have any inherent jurisdiction. Our determination of jurisdiction in footnote 4 as under 28 U.S.C. §1333, I believe to be sufficient.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 79-1580
79-1854
80-1028
80-1085
80-1116
80-1117
80-1118
80-1140
80-1228
80-1227
80-1154

(Styles of Cases Omitted)

ORDER

Upon motion of the appellant, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed pending application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court. The stay shall not exceed thirty (30) days unless the period is extended for cause shown.

For the Court by Direction.

/s/ William K. Slate, II
Clerk

FILED: October 23, 1981

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

CIVIL ACTION NO. 77-97-NN

JAMES T. OMAN, and
FRED R. WALKER,

Plaintiffs

v.

JOHNS-MANVILLE CORP.
and
JOHNS-MANVILLE SALES CORPORATION,
Successor by merger with
Johns-Manville Products Corporation
and
RAYBESTOS-MANHATTAN, INC.
and
OWENS-CORNING FIBERGLAS CORP.
Successor by purchase of Kaylo
Division of Owens-Illinois Glass
Company
and
PITTSBURGH CORNING CORPORATION
and
CELOTEX CORPORATION,
Successor by merger with Panacon
Corporation, which was successor
by merger of Briggs Manufacturing
Company and Philip Carey Corporation
and
UNARCO INDUSTRIES, INC.,
Formerly known as Union Asbestos
and Rubber Company

and
H.K. PORTER COMPANY,
Thermoid Division
and
SOUTHERN ASBESTOS COMPANY
and
EAGLE-PICHER INDUSTRIES INC.
and
FIBREBOARD CORPORATION, Pabco
Industrial Products Division
and
KEENE CORPORATION
Successor to Keene Building
Products Corporation, Successor
by merger to Baldwin-Ehret-Hill
Inc., successor by merger to
Ehret Magnesia Manufacturing
Company
and
NICOLET INDUSTRIES, Inc.,

Defendants

COMPLAINT

1. Plaintiffs JAMES T. OMAN and FRED R. WALKER are individuals, citizens and residents of the State of Virginia.

2. a. Defendant JOHNS-MANVILLE CORP., is a corporation organized and existing under the laws of the State of Delaware and is a citizen of the State of Delaware.

b. Defendant JOHNS-MANVILLE SALES CORPORATION, Successor by Merger with Johns-Manville Products Corporation is a corporation organized and existing under the laws of the State of Delaware, and is a citizen of the State of Delaware.

c. Defendant RAYBESTOS-MANHATTAN INC. is a corporation organized and existing under the laws of the State of Connecticut and is a citizen of the State of Connecticut.

d. Defendant OWENS-CORNING FIBERGLAS CORP., is a corporation organized and existing under the laws of the State of Delaware and is a citizen of the State of Delaware, and is successor by purchase of Kaylo Division of Owens-Illinois Glass Company.

e. Defendant, PITTSBURGH CORNING CORPORATION, is a corporation organized and existing under the laws of the State of Pennsylvania and is a citizen of the State of Pennsylvania.

f. Defendant, CELOTEX CORPORATION, is a corporation organized and existing under the laws of the State of Delaware, is a citizen of the State of Delaware and is successor by merger with Panacon Corporation, which was successor by merger of Briggs Manufacturing Company and Philip Carey Corporation which was formerly a corporation organized and existing under the laws of the State of Pennsylvania.

g. Defendant, UNARCO INDUSTRIES, INC., formerly known as Union Asbestos and Rubber Company, is a corporation organized and existing under the laws of the State of Delaware and is a citizen of the State of Delaware.

h. Defendant, H.K. PORTER COMPANY, Thermoid Division, is a corporation organized and existing under the laws of the State of Delaware and is a citizen of the State of Delaware.

i. Defendant, SOUTHERN ASBESTOS COMPANY, is a corporation organized and existing under the laws of the State of Delaware and is a citizen of the State of Delaware.

j. Defendant, EAGLE-PICHER INDUSTRIES INC., is a corporation organized and existing under the laws of the State of Ohio and is a citizen of the State of Ohio.

k. Defendant, FIBREBOARD CORPORATION, Pabco Industrial Products Division, is a corporation organized and existing under the laws of the State of Delaware and is a citizen of the State of Delaware.

l. Defendant, KEENE CORPORATION, is a corporation organized and existing under the laws of the State of Delaware and is a citizen of the State of Delaware, and is successor by merger to Keene Building Products Corporation, which was a corporation organized and existing under the laws of the State of Delaware, which was successor by merger to Baldwin-Ehret-Hill, Inc., which was a corporation organized and existing under the laws of the State of Pennsylvania, which was successor by merger to Ehret Magnesia Manufacturing Company, which was formerly a corporation organized and existing under the laws of the State of Pennsylvania.

m. Defendant, NICOLET INDUSTRIES, INC. is a corporation organized and existing under the laws of the State of Pennsylvania and is a citizen of the State of Pennsylvania.

3. The amount in controversy, exclusive of interest and costs, is in excess of Ten Thousand Dollars ($10,000.00).

4. Jurisdiction is based upon diversity of citizenship and jurisdictional amount pursuant to 28 USCA 1332(a)(1), and this is an action within the admiralty and maritime jurisdiction pursuant to Title 28 USCA §1333(1), Title 46 USCA §740, *et seq*, Title 33 USCA §901, *et seq*, and the general admiralty and maritime law of the United States, and this is an admiralty or maritime claim within the meaning of the Federal Rules of Civil Procedure 9(h).

5. At all times material hereto, Defendants acted through their agents, servants or employees, who were acting within the scope of their employment on the business of the Defendants.

6. The Defendants are all corporations, companies or other business entities, which, during all times material

hereto, and for a long time prior thereto, have been and/or are now engaged, directly or indirectly, in the mining, manufacturing, producing, processing, compounding, converting, selling, merchandising, supplying, distributing and/or otherwise placing in the stream of commerce asbestos, material containing asbestos, asbestos products and compounds (hereinafter referred to as "asbestos products").

7. Plaintiffs have been employed by the Newport News Shipbuilding & Dry Dock Company in Newport News, Virginia as follows:

a. JAMES T. OMAN has been employed from 1937 to the present time as a pipe coverer and insulator.

b. FRED R. WALKER was employed from 1945 to 1947, from 1948 to 1950, and from 1953 until the present time as a pipe coverer and insulator.

8. Throughout the years of each Plaintiff's employment at Newport News Shipbuilding & Dry Dock Company, each Plaintiff worked aboard United States Navy vessels, Merchant Marine vessels, commercial vessels, and passenger vessels, both in dry dock and on the navigable waters of the United States, performing maritime shipbuilding and ship repair, and on occasion each Plaintiff would also work on components and appurtenances of such vessels, on the piers, wharves, and shops of the Newport News Shipyard. In the performance of each Plaintiff's said work, each Plaintiff was continually required to install, remove, repair, and/or replace the Defendants' asbestos products, and each Plaintiff continually worked with, used, and was caused to come in contact with and be exposed to, the Defendants' asbestos products and to the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products, as more particularly hereinafter described in Paragraph 9.

9. a. At all times material hereto, Defendants JOHNS-MANVILLE CORP., and JOHNS-MANVILLE SALES COR-

PORATION, Successor by merger with JOHNS-MANVILLE PRODUCTS CORPORATION, mined, manufactured, produced, sold and supplied, either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia asbestos products including but not limited to 85% Magnesia Pipecovering and Block, 85% Magnesia Cement, Superex Pipecovering and Block, Thermobestos Pipecovering and Block, Asbestos Blankets and Felt, Superex Cement, Thermobestos Cement, 300 Cement, 301 Cement, 302 Cement, 304 Cement, 340 Cement, 352 Cement, 364 Cement, 400 Cement, 450 Cement, 500 Cement, and 0352 Cement, and other asbestos products too numerous to list.

b. At all times material hereto, Defendant RAYBESTOS MANHATTAN INC., mined, manufactured, produced, sold and supplied, either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to Allbestos, Terrybestos, Glassbestos, Fluorobestos, Gatortape, Goldbestos, Micabestos, Novabestos, Novatex, Polybestos, Pyrotex, Rhinobestos, Silvabestos, Speed Lag, and Tri-bestos, and other asbestos products too numerous to list.

c. At all times material hereto, Defendant OWENS-CORNING FIBERGLAS CORP., Successor by Purchase of Kaylo Division of Owens-Illinois Glass Company, mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to Kaylo, Kaylo 10, Kaylo 20, Kaylo Block, Kaylo Super Block, Kaylo Pipe Covering, and Calcium Silicate.

d. At all times material hereto, Defendant PITTSBURGH CORNING CORP. mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to Unibestos Pipecovering and Block.

e. At all times material hereto, Defendant CELOTEX CORPORATION, Successor by Merger with Panacon

Corporation which was successor by merger of Briggs Manufacturing Company and Philip Carey Corporation, mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard in Newport News, Virginia, asbestos products including but not limited to High Temp Block, Alltemp Pipecovering, Caltemp, 85% Magnesia Block, Careytemp Block, Temp-Check, Asbestos Paper, Asbestos Millboard, Air Cell, Fibrous Adhesive Bonding, Careytemp Adhesive Bonding, 7M-90 Asbestos Shorts Insulation Cement, Vitrecel Cement (Refractory Finishing), LF 20 Asbestos Cement (long fiber), No. 100 Asbestos Cement (hard finish), No. 303 Asbestos Cement, Careytemp Asbestos Cement, MW-50 Cement, MW-One Cement.

f. At all times material hereto, Defendant UNARCO INDUSTRIES, INC., Formerly known as Union Asbestos and Rubber Company, mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to Insubestos, Unarco Board, Unibestos Pipe Covering and Block, UNARCO Wovenstone, Chembest, UNARCO Insutape Insulation, UNARCO Insubestos Felt, Amosite Felt, Asbestos Felt, UNARCO Insutape (Superinsutape), UNARCO Insulating Cement, UNARCO Asbestos Heat Retention Bags.

g. At all times material hereto, Defendant, H.K. PORTER COMPANY, THERMOID DIVISION, mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to cloth, tape, yarn/cord, felt, rope/wick, tubing and amosite blankets, such as Portersite and Porterlag and other cloth such as Themagard, Cleangard, Covergard, Flamegard, Guardian, Heatgard, Splashgard, Weldgard, Inslgard, and Soundgard.

h. At all times material hereto, Defendant SOUTHERN ASBESTOS COMPANY manufactured, produced and

sold either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to cloth, tape, yarn/cord, felt, rope/wick, tubing and blankets, such as Thermagard, Cleangard, Covergard, Flamegard, Guardian, Heatgard, Splashgard, Weldgard, Inslgard, and Soundgard.

i. At all times material hereto, Defendant EAGLE-PICHER INDUSTRIES, INC., mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to Epitherm 1200, Super 66 Insulating Cement, Eagle 20, Hylo Cement, Hy-Stick, One-Cote Cement, Insulseal, Eagle-Picher Blankets, Eagle-Picher Magnesia, P.V. Supertemp, 33 Insulating Cement, 99 Insulating Cement, 106 Insulating Cement, Eagle Dry Cote, Insulstic, and 43 Finishing Cement.

j. At all times material hereto, Defendant FIBREBOARD CORPORATION, PABCO INDUSTRIAL PRODUCTS DIVISION, mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to Caltemp, Pabco Magnesia Pipe Covering, Prasco, Super Caltemp, F1 Cement, No. 127.

k. At all times material hereto, Defendant KEENE CORPORATION, Successor by merger to Keene Building Products Corporation, Successor by merger to Baldwin-Ehret-Hill Inc., successor by merger to Ehret Magnesia Manufacturing Company, mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard in Newport News, Virginia, asbestos products including but not limited to Mono Block and Pipe Covering, Thermalite Pipe Covering and Block, Thermasil Pipe Covering and Block, Pyrospray, Types I, T & S, Super Powerhouse Cement, Monoblock Calcium Silicate, Mono-Spray, BEH #1 Plus, Number One Plus Cement.

1. At all times material hereto, Defendant NICOLET INDUSTRIES, INC. mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to Air Cell, Asbestos Millboard, Asbestos Sheet Packing and Asbestos Paper.

COUNT I

10. Each Plaintiff hereby incorporates by reference Paragraphs One (1) through Nine (9) inclusive, as if the same were hereto set forth at length.

11. At all times material hereto, the asbestos products mined, manufactured, produced, processed, compounded, converted, sold, merchandised, supplied, distributed and/or otherwise placed in the stream of commerce by the Defendants with which the Plaintiffs continually worked, used, handled, and were caused to come into contact with and be exposed to were under the exclusive control of the Defendants; accordingly, the Plaintiffs invoke the Doctrine of Exclusive Control and the Doctrine of Res Ipsa Loquitur.

12. At all times material hereto, the Defendants mined, manufactured, produced, processed, compounded, converted, sold, merchandised, supplied, distributed and/or otherwise placed in the stream of commerce the said asbestos products, all of which the Defendants knew, or in the exercise of ordinary care should have known, were inherently defective, ultrahazardous, dangerous, deleterious, poisonous and otherwise highly harmful to the Plaintiffs, and to other persons similarly employed.

13. At all times material hereto, the Plaintiffs did not know of the nature and extent of the danger to their lungs, respiratory system, heart, other bodily parts and their general health that would result from their contact with and exposure to the Defendants' asbestos products and to the inhalation of the asbestos dust and fibers resulting from the

ordinary and foreseeable use of such asbestos products; whereas at all times material hereto, each of the Defendants knew, should have known, or could have reasonably determined that the Plaintiffs and others similarly employed would be on contact with and be exposed to the Defendants' asbestos products and to the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of such asbestos products and despite such facts, Defendants, individually, jointly and severally:

a. Mined, manufactured, produced, processed, compounded, converted, sold, merchandised, supplied, distributed and/or otherwise placed in the stream of commerce asbestos products which Defendants knew were inherently dangerous, defective, ultrahazardous, deleterious, poisonous and otherwise highly harmful to the Plaintiffs and to other persons similarly employed;

b. Failed to take any reasonable precautions or to exercise reasonable care to adequately or sufficiently warn the Plaintiffs and other persons similarly employed of the dangers and harm to which they were exposed by continuous work with, contact with, and handling of the Defendants' asbestos products and the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of such asbestos products;

c. Failed and omitted to provide the Plaintiffs and other persons similarly employed with the knowledge of reasonably safe and sufficient safeguards, wearing apparel, proper safety equipment and appliances needed to protect them from being injured, poisoned, disabled, killed, or otherwise harmed, by working with, using, handling, coming into contact with, and being exposed to the Defendants' asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of the said asbestos products;

d. Failed and omitted to place warnings or adequate and sufficient warnings on their containers of the said

asbestos products regarding the risks and dangers therefrom and, the precautions necessary to make said asbestos products safe for their ordinary and foreseeable use;

e. Failed to package the said asbestos products so that in the ordinary and foreseeable use and handling thereof the Plaintiffs and other persons similarly employed would not come into contact with and be exposed to the inhalation of asbestos dust and fibers from said asbestos products;

f. Failed to take reasonable, sufficient and proper precautions reasonably calculated to reach such persons as the Plaintiffs and other persons similarly employed to warn them of the inherently dangerous, deleterious, poisonous, and otherwise highly harmful effects of the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of the Defendants' asbestos products and to instruct them in the proper and safe use and handling of said asbestos products;

g. Failed to take any reasonable, sufficient and proper precautions or to exercise reasonable care to protect the Plaintiffs and other persons similarly employed, from harm and danger resulting from working with, using, handling, coming into contact with and being exposed to the Defendants' asbestos products and the inhalation of asbestos dust and fibers from the ordinary and foreseeable use of the said asbestos products.

h. Failed to adopt and enforce a safe, sufficient and proper plan and method of working with, using, handling and coming into contact with and being exposed to Defendants' asbestos products so that Plaintiffs and other persons similarly employed would not inhale the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products.

i. Failed to adequately test their respective asbestos products before offering them for sale and use so that Plaintiffs and other persons similarly employed would not inhale

the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

j. Failed to render such asbestos products safe or to provide proper and sufficient safeguards for the use and handling thereof so that Plaintiffs and other persons similarly employed would not inhale the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

k. Failed to remove and recall such asbestos products from the stream of commerce and marketplace upon ascertaining that such asbestos products would cause asbestosis, scarred lungs, respiratory disorders, mesothelioma, cancers and other injuries, some or all of which are permanent and may be fatal;

l. Failed to comply with the Federal Hazardous Substance Act, Title 15, U.S.C.A. §1261, *et seq.*

m. Failed to advise the Plaintiffs and others similarly employed, who the Defendants knew or should have known had been exposed to long-term inhalation of asbestos dust and fibers, to cease all future exposure to the inhalation of all types of other fumes, smoke, dust, and fibers, and to be examined by a lung specialist to determine the nature and extent of any and all diseases caused by such exposure and to receive treatment for such diseases.

COUNT II

14. Each Plaintiff hereby incorporates by reference Paragraphs One (1) through Thirteen (13) inclusive, as if the same were hereto set forth at length.

15. Defendants impliedly warranted that the asbestos products which they mined, manufactured, produced, processed, compounded, converted, sold, merchandised, supplied, distributed and/or otherwise placed in the stream of

commerce were reasonably fit for use and safe for their intended purpose.

16. Defendants breached said warranties to Plaintiffs in that their said asbestos products were inherently defective, hazardous, dangerous, unfit for use, not properly merchantable, and not safe for their intended ordinary and foreseeable use and purpose.

COUNT III

17. Each Plaintiff hereby incorporates by reference Paragraphs One (1) through Sixteen (16) inclusive, as if the same were hereto set forth at length.

18. Defendants knew, or in the exercise of reasonable car should have known, that their asbestos products would be sold to the public including employers of workers at the Newport News Shipyard and would be used by Plaintiffs and other persons similarly employed, and would be relied on by such persons to be fit for the use and to accomplish the purpose for which they were mined, manufactured, produced, processed, sold, supplied, distributed and/or otherwise placed in the stream of commerce; and the Defendants, because of their positions as miners, manufacturers, producers, processors, sellers, suppliers and distributors, are STRICTLY LIABLE to each of the Plaintiffs for the following reasons:

a. Defendants as manufacturers-sellers are engaged in the business, *inter alia*, of selling asbestos products;

b. That at the time of the manufacture and sale of their asbestos products by the Defendants to the employer of the Plaintiffs, Defendants knew, or had reason to know, that the said asbestos products would be used by the Plaintiffs and other persons similarly employed, as the ultimate user or consumer;

c. That the said asbestos products were sold by the Defendants in a defective condition, unreasonably danger-

ous to the Plaintiffs and others similarly employed, as users or consumers and that all throughout the many years of the Plaintiffs' exposure to and use of the said products, the said asbestos products were expected to and did reach the user or consumer without substantial change in the condition in which they were sold; and

d. That the said asbestos products were defective in that they are incapable of being made safe for their ordinary and intended use, and said Defendants failed to give adequate or sufficient warnings or instructions about the risks and dangers inherent in the products;

e. That the ordinary and foreseeable use of the Defendants' asbestos products is an intrinsically dangerous and ultra hazardous activity.

COUNT IV

19. Each Plaintiff hereby incorporates by reference Paragraphs One (1) through Eighteen (18) inclusive, as if the same were hereto set forth at length.

20. Defendants, individually, jointly and in conspiracy with each other, and as an industrial and trade association or group, for many decades have been possessed of medical and scientific data which clearly indicated that the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of their asbestos products were unreasonably dangerous, ultra hazardous, deleterious, poisonous, carcinogenic and potentially deadly.

21. Despite the medical and scientific data possessed by and available to them, the Defendants, prompted by pecuniary motives, individually, jointly and in conspiracy with each other, fraudulently, willfully, deliberately, maliciously and callously:

a. Ignored, withheld and/or actively concealed said medical and scientific data from the public, and particularly

the workers such as the Plaintiffs, who were using and being exposed to the Defendants' asbestos products and to the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

b. Caused to be released, published and/or disseminated data and reports concerning the dangers of their asbestos products, which data and reports they knew, should have known, or could have reasonably been determined to be incorrect, incomplete, outdated and misleading;

c. Failed and refused to provide the public, or workers such as the Plaintiffs, who would foreseeably use and/or be exposed to their asbestos products and to the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products, with any warning as to the dangers of their asbestos products which the Defendants knew, should have known, or could have reasonably determined to be inherent in the use of and exposure of people to said asbestos products and to the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

d. Deliberately chose to provide patently inadequate and ambiguous warnings and intentionally failed to warn of the known dangers when finally compelled by the state of medical art to provide notice of the dangers of their asbestos products and the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

e. Distorted and/or caused to be misdiagnosed the results of medical examinations conducted upon persons and workers such as the Plaintiffs, who were using and handling said asbestos products and being exposed to and the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

f. Refused and failed to test their asbestos products and/or tested their products and willfully concealed, or re-

fused to publish adverse test results, or distorted said adverse test results so that the public and workers such as the Plaintiffs were misled into believing the test results were not adverse;

g. Relied upon and caused to be disseminated tests, medical and scientific data that they knew, should have known, or could have reasonably determined to be inadequate, incomplete, outdated, and misleading.

22. Defendants, individually, jointly and in conspiracy with each other, participated in the fraudulent schemes described in Paragraph Twenty-One (21) above to keep the Plaintiffs and others similarly employed, in ignorance of their rights by fraudulently concealing the nature and extent of the harm which they have suffered as a result of using and being exposed to the Defendants' asbestos products and by fraudulently concealing that this harm was the direct and proximate result of the occupational use and exposure to the Defendants' asbestos products and the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products, and in fact said fraudulent scheme did keep the Plaintiffs and others similarly employed in ignorance of their rights.

23. Defendants, individually, jointly and in conspiracy with each other, intended by the fraudulent misrepresentations and omissions as set forth in Paragraph Twenty-Two (22) above to induce the Plaintiffs and others similarly employed, to rely upon said fraudulent misrepresentation and omissions, and to continue to expose themselves to the dangers that the Defendants knew to be inherent in the use of and exposure to their asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products, without warning the Plaintiffs and others similarly employed of these dangers, thereby depriving them of the opportunity of informed free choice as to whether to continue to use such asbestos products and to expose themselves to these dangers.

24. Defendants, individually, jointly and in conspiracy with each other and through trade associations in which they were members maliciously, willfully, callously and deliberately:

a. Exposed and continued to expose the Plaintiffs and others similarly employed to the risks and dangers of asbestosis, mesothelioma, scarred lungs, cancer and other illnesses and damage to various organs of the body, including injury to tissue and bone, all of which risks Defendants knew, should have known, or could have reasonably determined;

b. Failed to test and continue to test their asbestos products regarding the risks and dangers to persons who use or were exposed to their asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

c. Ignored Medical and scientific data regarding the risks of asbestosis, scarred lungs, cancer, mesothelioma and other illness to workers such as the Plaintiffs who used or were exposed to their asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

d. Sought methods to ignore or defeat workmen's compensation and other claims of workers such as the Plaintiffs who suffered from illnesses or diseases from use of or exposure to their asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

e. Attempted to discredit scientists, doctors, writers, and medical literature, who or which indicated, demonstrated, or established a relationship between illness and disease from the use of and exposure to their asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

f. Refused to conduct research on the relationship between asbestos exposure and disease, because pecuniary motives of profit were followed at the expense of human lives;

g. Sought to create favorable publicity about asbestos products for pecuniary motives when they knew of their risks and dangers;

h. Failed to seek safe substitute products for asbestos for pecuniary motives of profit at the expense of human lives;

i. Misled the public and workers such as the Plaintiffs who used or were exposed to their asbestos products and indicating that their asbestos products were safe in their ordinary and foreseeable use;

j. Concealed the existence of tests, data, literature, and medical reports regarding the causal relationship of asbestos to cancer, mesothelioma, scarred lungs, asbestosis, respiratory disorders and other illnesses;

k. Refused to authorize testing and research involving the relationship of illness and disease to exposure, to use of and inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of their asbestos products, fearing adverse publicity would affect the highly profitable market of asbestos sales;

l. Chose to rely on inaccurate or insufficient medical and scientific research or data regarding the causal relationship between asbestos products and disease, in order to avoid any possible adverse publicity that would affect sales of their asbestos products;

m. Failed to place adequate or proper warnings on their asbestos products fearing that such warnings would adversely affect sales.

25. The Plaintiffs reasonably and in good faith relied upon the fraudulent misrepresentations, omissions, and

concealments made by the Defendants, individually, jointly, and in conspiracy with each other, regarding the safe nature of their asbestos products, which reliance resulted in illness and injuries to each Plaintiff, the particulars of which will be more fully herein set forth.

COUNT V

26. Each Plaintiff hereby incorporates by reference Paragraphs One (1) through Twenty-Five (25) inclusive, as if the same were hereto set forth at length.

27. As a direct and proximate result of the negligence, carelessness, gross negligence, willful misconduct, breach of warranty, strict liability, fraudulent concealment and misrepresentations and willful omissions of the Defendants, each Plaintiff was caused to contract diseases and injuries to his body systems, lungs, respiratory system, heart and damage to various organs of his body, including injury to tissue and bone such as, but not limited to, mesothelioma, asbestosis, scarred lungs, respiratory disorders, cancers and other injuries causing him pain, suffering and mental anguish, some or all of which may be permanent and/or fatal.

28. As a direct and proximate result of the negligence, carelessness, gross negligence, willful misconduct, breach of warranty, strict liability, fraudulent concealment and misrepresentation and willful omissions of the Defendants, each Plaintiff has been obliged to spend various sums of money to treat his diseases and injuries, and he may be obliged to continue to do so; and as a direct and proximate result of the aforesaid, each Plaintiff has and will sustain a loss of earnings and earning capacity; and as a direct and proximate result of the aforesaid, each Plaintiff's enjoyment of life has been impaired and his life expectancy shortened.

29. Each Plaintiff's causes of action as set forth herein accrued within two years of the filing of this complaint, and any delay in bringing these proceedings arises from fraud of

the Defendants as more particularly set forth in Count IV herein.

WHEREFORE, each of the named Plaintiffs prays for judgments against the Defendants, and each of them, jointly and severally for compensatory damages in the sum of ONE MILLION DOLLARS ($1,000,000.00), and punitive damages in the sum of TWO MILLION DOLLARS ($2,000,000.00) plus the costs of this suit, and such other and further relief as may be just and proper, and

WHEREFORE, both of the Plaintiffs in the aggregate pray for judgment against the Defendants, and each of you, individually and jointly and severally for compensatory damages in the sum of TWO MILLION DOLLARS ($2,000,000.00) and punitive damages in the sum of FOUR MILLION DOLLARS ($4,000,000.00).

Respectfully submitted,

JAMES T. OMAN and
FRED R. WALKER

By

Of Counsel

PLAINTIFFS DEMAND A JURY WITH RESPECT TO ALL ISSUES FOR WHICH THEY ARE ENTITLED BY LAW TO A JURY.

Robert R. Hatten
PATTEN & WORNOM
14749 Warwick Boulevard
Newport News, Virginia 23602

Gene Locks
1500 Walnut Street
Philadelphia, Pennsylvania 19102

Richard S. Glasser
GLASSER AND GLASSER
504 Plaza One Building
Norfolk, Virginia 23510

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

C/P NO. 77-1

CIVIL ACTION NO. 77-11-NN

JAMES W. WHITE, RONALD M. CASH, DONAHUE ELLIS, WILLIE A. GIBBONS, THOMAS J. HOGGE, MAURICE W. HOLLOWAY, WILSON W. JONES, HUGH V. REYNOLDS, THOMAS R. SAWYER, MILTON L. STACEY, ROBERT L. VAN DYKE, WALTER J. WHITE, JAMES T. LONG, and HOMER E. WATSON

Plaintiffs

v.

JOHNS-MANVILLE CORP.
and
JOHNS-MANVILLE SALES CORPORATION
Successor by merger with
Johns-Manville Products Corporation
and
RAYBESTOS-MANHATTAN INC.
and
OWENS-CORNING FIBERGLAS CORP.
Successor by purchase of Kaylo
Division of Owens-Illinois Glass
Company
and
PITTSBURGH CORNING CORPORATION

and
CELOTEX CORPORATION
Successor by merger with Panacon
Corporation, which was successor
by merger of Briggs Manufacturing
Company and Philip Carey Corporation
and
UNARCO INDUSTRIES, INC.
Formerly known as Union Asbestos
and Rubber Company
and
H.K. PORTER COMPANY,
Thermoid Division
and
SOUTHERN ASBESTOS COMPANY
and
EAGLE-PICHER INDUSTRIES INC.
and
FIBREBOARD CORPORATION, Pabco
Industrial Products Division
and
KEENE BUILDING PRODUCTS CORPORATION
Successor by merger to Baldwin-Ehret-Hill
Inc., successor by merger to
Ehret Magnesia Manufacturing
Company
and
NICOLET INDUSTRIES, INC.,

Defendants

AMENDED COMPLAINT

1. Plaintiffs, JOHN W. WHITE, RONALD M. CASH, DONAHUE ELLIS, WILLIE A. GIBBONS, THOMAS J. HOGGE, MAURICE W. HOLLOWAY, WILSON W. JONES, HUGH V. REYNOLDS, THOMAS R. SAWYER, MILTON L.

STACEY, ROBERT L. VAN DYKE, WALTER J. WHITE, JAMES T. LONG, and HOMER E. WATSON, are individuals, citizens and residents of the State of Virginia.

2. a. Defendant JOHNS-MANVILLE CORP., is a corporation organized and existing under the laws of the State of New York and is a citizen of the State of New York.

b. Defendant JOHNS-MANVILLE SALES CORPORATION, Successor by Merger with Johns-Manville Product Corporation, is a corporation organized and existing under the laws of the State of New York and is a citizen of the State of New York.

c. Defendant RAYBESTOS-MANHATTAN INC. is a corporation organized and existing under the laws of the State of Connecticut and is a citizen of the State of Connecticut.

d. Defendant OWENS-CORNING FIBERGLAS CORP., is a corporation organized and existing under the laws of the State of Delaware and is a citizen of the State of Delaware, and is successor by purchase of Kaylo Division of Owens-Illinois Glass Company.

e. Defendant, PITTSBURGH CORNING CORPORATION, is a corporation organized and existing under the laws of the State of Pennsylvania and is a citizen of the State of Pennsylvania.

f. Defendant, CELOTEX CORPORATION, is a corporation organized and existing under the laws of the State of Delaware, is a citizen of the State of Delaware and is successor by merger with Panacon Corporation, which was successor by merger of Briggs Manufacturing Company and Philip Carey Corporation which was formerly a corporation organized and existing under the laws of the State of Pennsylvania.

g. Defendant, UNARCO INDUSTRIES, INC., formerly known as Union Asbestos and Rubber Company, is a corporation organized and existing under the laws of the State of Delaware and is a citizen of the State of Delaware.

h. Defendant, H.K. PORTER COMPANY, Thermoid Division, is a corporation organized and existing under the laws of the State of Delaware and is a citizen of the State of Delaware.

i. Defendant, SOUTHERN ASBESTOS COMPANY, is a corporation organized and existing under the laws of the State of Delaware and is a citizen of the State of Delaware.

j. Defendant, EAGLE-PICHER INDUSTRIES INC., is a corporation organized and existing under the laws of the State of Ohio and is a citizen of the State of Ohio.

k. Defendant, FIBREBOARD CORPORATION, Pabco Industrial Products Division, is a corporation organized and existing under the laws of the State of Delaware and is a citizen of the State of Delaware.

l. Defendant, KEENE BUILDING PRODUCTS CORPORATION, is a corporation organized and existing under the laws of the State of Delaware, and is a citizen of the State of Delaware and is successor by merger to Baldwin-Ehret-Hill Inc., which was a corporation organized and existing under the laws of the State of Pennsylvania, which was successor by merger to Ehret Magnesia Manufacturing Company, which was formerly a corporation organized and existing under the laws of the State of Pennsylvania.

m. Defendant, NICOLET INDUSTRIES, INC. is a corporation organized and existing under the laws of the State of Pennsylvania and is a citizen of the State of Pennsylvania.

3. The amount in controversy, exclusive of interest and costs, is in excess of Ten Thousand Dollars ($10,000.00).

4. Jurisdiction is based upon diversity of citizenship and jurisdictional amount pursuant to 28 USCA 1332 (a) (1), and this is an action within the admiralty and maritime jurisdiction pursuant to Title 28 USCA §1333(1) and Title 46 USCA

§740 and the general admiralty or maritime law of the United States and this is an admiralty or maritime claim within the meaning of the Federal Rules of Civil Procedure 9(h).

5. At all times material hereto, Defendants acted through their agents, servants or employees, who were acting within the scope of their employment on the business of the Defendants.

6. The Defendants are all corporations, companies or other business entities, which, during all times material hereto, and for a long time prior thereto, have been and/or are now engaged, directly or indirectly, in the mining, manufacturing, producing, processing, compounding, converting, selling, merchandising, supplying, distributing and/or otherwise placing in the stream of commerce asbestos, material containing asbestos, asbestos products and compounds (hereinafter referred to as "asbestos products").

7. All Plaintiffs are and/or were employed for various times by the Newport News Shipbuilding & Dry Dock Company in Newport News, Virginia as follows:

a. John W. White was employed from 1941 to 1944, and from 1946 to January 1, 1975 as a pipe coverer and insulator, and a foreman pipe coverer and insulator.

b. Ronald M. Cash was employed from 1953 to the present time as a pipe coverer and insulator.

c. Donahue Ellis has been employed from 1958 to the present time as a pipe coverer and insulator.

d. Willie A. Gibbons has been employed from 1947 to the present time as a pipe coverer and insulator.

e. Thomas J. Hogge was employed from 1940 to 1975 as a pipe coverer and insulator.

f. Maurice W. Holloway has been employed from 1947 to the present time as a maintenance supervisor and sheet metal worker.

g. Wilson W. Jones has been employed for part of 1940, from 1946 to 1958, and from 1961 to the present as pipe coverer and insulator.

h. Hugh V. Reynolds was employed from 1949 to 1951, and from 1959 to May 1976 as a pipe coverer and insulator.

i. Thomas R. Sawyer has been employed from 1960 to the present time as a painter.

j. Milton L. Stacey was employed from 1929 to 1975 as a pipe coverer and insulator.

k. Robert L. Van Dyke has been employed from 1941 to 1944, and from 1948 to the present time as a pipe coverer and insulator.

l. Walter J. White was employed from 1945 to September 30, 1975 as a pipe coverer and insulator.

m. James T. Long was employed from 1957 to 1961 as a painter and joiner, and from 1967 until 1972 as a monitor.

n. Homer E. Watson was employed from 1950 to 1972 as a welder.

8. Throughout the years of each Plaintiff's employment at Newport News Shipbuilding & Dry Dock Company, each Plaintiff worked aboard United States Navy ships and Merchant Marine ships, both in dry dock and on the navigable waters of the United States, and on occasion each Plaintiff would also work on components of such ships, on the piers, wharves, and shops of the Newport News Shipyard. In the performance of each Plaintiff's duties, each Plaintiff was continually required to install, remove, repair, and/or replace the Defendants' asbestos products, and each Plaintiff continually worked with, used, and was caused to come in contact with and be exposed to, the Defendants' asbestos products and to the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said

asbestos products, as more particularly hereinafter described in Paragraph 9.

9. a. At all times material hereto, Defendants JOHNS-MANVILLE CORP., and JOHNS-MANVILLE SALES CORPORATION, Successor by Merger with JOHNS-MANVILLE PRODUCTS CORPORATION, mined, manufactured, produced, sold and supplied, either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to 85% Magnesia Pipecovering and Block, 85% Magnesia Cement, Superex Pipecovering and Block, Thermobestos Pipecovering and Block, Asbestos Blankets and Felt, Superex Cement, Thermobestos Cement, 300 Cement, 301 Cement, 302 Cement, 304 Cement, 340 Cement, 352 Cement, 364 Cement, 400 Cement, 450 Cement, 500 Cement, and 0352 Cement, and other asbestos products too numerous to list.

b. At all times material hereto, Defendant RAYBESTOS MANHATTAN INC., mined, manufactured, produced, sold and supplied, either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to Allbestos, Terrybestos, Glassbestos, Fluorobestos, Gatortape, Goldbestos, Micabestos, Novabestos, Novatex, Polybestos, Pyrotex, Rhinobestos, Silvabestos, Speed Lag, and Tri-bestos, and other asbestos products too numerous to list.

c. At all times material hereto, Defendant OWENS-CORNING FIBERGLAS CORP., Successor by Purchase of Kaylo Division of Owens-Illinois Glass Company, mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to Kaylo, Kaylo 10, Kaylo 20, Kaylo Block, Kaylo Super Block, Kaylo Pipe Covering, and Calcium Silicate.

d. At all times material hereto, Defendant PITTSBURGH CORNING CORP. mined, manufactured, produced and sold either directly or indirectly to the Newport News

Shipyard, in Newport News, Virginia, asbestos products including but not limited to Unibestos Pipecovering and Block.

e. At all times material hereto, Defendant CELOTEX CORPORATION, Successor by Merger with Panacon Corporation which was successor by merger of Briggs Manufacturing Company and Philip Carey Corporation, mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard in Newport News, Virginia, asbestos products including but not limited to High Temp Block, Alltempt Pipecovering, Caltemp, 85% Magnesia Block, Careytemp Block, Temp-Check, Asbestos Paper, Asbestos Millboard, Air Cell, Fibrous Adhesive Bonding, Careytemp Adhesive Bonding, 7M-90 Asbestos Shorts Insulation Cement, Vitrecel Cement (Refractory Finishing), LF 20 Asbestos Cement (long fiber), No. 100 Asbestos Cement (hard finish), No. 303 Asbestos Cement, Careytemp Asbestos Cement, MW-50 Cement, MW-One Cement.

f. At all times material hereto, Defendant UNARCO INDUSTRIES, INC., Formerly known as Union Asbestos and Rubber Company, mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to Insubestos, Unarco Board, Unibestos Pipe Covering and Block, UNARCO Wovenstone, Chembest, UNARCO Insutape Insulation, UNARCO Insubestos Felt, Amosite Felt, Asbestos Felt, UNARCO Insutape (Superinsutape), UNARCO Insulating Cement, UNARCO Asbestos Heat Retention Bags.

g. At all times material hereto, Defendant H.K. PORTER COMPANY, THERMOID DIVISION, mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to cloth, tape, yarn/cord, felt, rope/wick, tubing and amosite blankets, such as Portersite and Porterlag and other cloth such as Thermagard, Cleangard, Covergard, Flamegard, Guardian, Heatgard, Splashgard, Weldgard, Inslgard, and Soundgard.

h. At all times material hereto, Defendant SOUTHERN ASBESTOS COMPANY manufactured, produced and sold either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to cloth, tape, yarn/cord, felt, rope/wick, tubing and blankets, such as Thermagard, Cleangard, Covergard, Flamegard, Guardian, Heatgard, Splashgard, Weldgard, Insigard, and Soundgard.

i. At all times material hereto, Defendant EAGLE-PICHER INDUSTRIES, INC., mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to Epitherm 1200, Super 66 Insulating Cement, Eagle 20, Hylo Cement, Hy-Stick, One-Cote Cement, Insulseal, Eagle-Picher Blankets, Eagle-Picher Magnesia, P.V. Supertemp, 33 Insulating Cement, 99 Insulating Cement, 106 Insulating Cement, Eagle Dry Cote, Insulstic, and 43 Finishing Cement.

j. At all times material hereto, Defendant FIBREBOARD CORPORATION, PABCO INDUSTRIAL PRODUCTS DIVISION, mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to Caltemp, Pabco Magnesia Pipe Covering, Prasco, Super Caltemp, F1 Cement, No. 127.

k. At all times material hereto, Defendant KEENE BUILDING PRODUCTS CORPORATION, Successor by merger to Baldwin-Ehret-Hill Inc., successor by merger to Ehret Magnesia Manufacturing Company, mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to Mono Block and Pipe Covering, Thermalite Pipe Covering and Block, Thermasil Pipe Covering and Block, Pyrospray, Types I, T & S, Super Powerhouse Cement, Monoblock Calcium Silicate, Mono-Spray, BEH #1 Plus, Number One Plus Cement.

9. At all times material hereto, Defendant NICOLET INDUSTRIES, INC., mined, manufactured, produced and sold either directly or indirectly to the Newport News Shipyard, in Newport News, Virginia, asbestos products including but not limited to Air Cell, Asbestos Millboard, Asbestos Sheet Packing and Asbestos Paper.

COUNT I

10. Each Plaintiff hereby incorporates by reference Paragraphs One (1) through Nine (9) inclusive, as if the same were hereto set forth at length.

11. At all times material hereto, the asbestos products mined, manufactured, produced, processed, compounded, converted, sold, merchandised, supplied, distributed and/or otherwise placed in the stream of commerce by the Defendants with which the Plaintiffs continually worked, used, handled, and were caused to come into contact with and be exposed to were under the exclusive control of the Defendants; accordingly, the Plaintiffs invoke the Doctrine of Exclusive Control and the Doctrine of Res Ipsa Loquitur.

12. At all times material hereto, the Defendants mined, manufactured, produced, processed, compounded, converted, sold, merchandised, supplied, distributed and/or otherwise placed in the stream of commerce the said asbestos products, all of which the Defendants knew, or in the exercise of ordinary care should have known, were inherently defective, ultrahazardous, dangerous, deleterious, poisonous and otherwise highly harmful to the Plaintiffs, and to other persons similarly employed.

13. At all times material hereto, the Plaintiffs did not know of the nature and extent of the danger to their lungs, respiratory system, heart, other bodily parts and their general health that would result from their contact with and exposure to the Defendants' asbestos products and to the inhalation of the asbestos dust and fibers resulting from the ordi-

nary and foreseeable use of such asbestos products; whereas at all times material hereto, each of the Defendants knew, should have known, or could have reasonably determined that the Plaintiffs and others similarly employed would be in contact with and be exposed to the Defendants' asbestos products and to the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of such asbestos products and despite such facts, Defendants, individually, jointly and severally:

a. Mined, manufactured, produced, processed, compounded, converted, sold, merchandised, supplied, distributed and/or otherwise placed in the stream of commerce asbestos products which Defendants knew were inherently dangerous, defective, ultrahazardous, deleterious, poisonous and otherwise highly harmful to the Plaintiffs and to other persons similarly employed;

b. Failed to take any reasonable precautions or to exercise reasonable care to adequately or sufficiently warn the Plaintiffs and other persons similarly employed of the dangers and harm to which they were exposed by continuous work with, contact with, and handling of the Defendants' asbestos products and the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of such asbestos products;

c. Failed and omitted to provide the Plaintiffs and other persons similarly employed with the knowledge of reasonably safe and sufficient safeguards, wearing apparel, proper safety equipment and appliances needed to protect them from being injured, poisoned, disabled, killed, or otherwise harmed, by working with, using, handling, coming into contact with, and being exposed to the Defendants' asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of the said asbestos products;

d. Failed and omitted to place warnings or adequate and sufficient warnings on their containers of the said

asbestos products regarding the risks and dangers therefrom and, the precautions necessary to make said asbestos products safe for their ordinary and foreseeable use;

e. Failed to package the said asbestos products so that in the ordinary and foreseeable use and handling thereof the Plaintiffs and other persons similarly employed would not come into contact with and be exposed to the inhalation of asbestos dust and fibers from said asbestos products;

f. Failed to take reasonable, sufficient and proper precautions reasonably calculated to reach such persons as the Plaintiffs and other persons similarly employed to warn them of the inherently dangerous, deleterious, poisonous, and otherwise highly harmful effects of the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of the Defendants' asbestos products and to instruct them in the proper and safe use and handling of said asbestos products;

g. Failed to take any reasonable, sufficient and proper precautions or to exercise reasonable care to protect the Plaintiffs and other persons similarly employed, from harm and danger resulting from working with, using, handling, coming into contact with and being exposed to the Defendants' asbestos products and the inhalation of asbestos dust and fibers from the ordinary and foreseeable use of the said asbestos products.

h. Failed to adopt and enforce a safe, sufficient and proper plan and method of working with, using, handling and coming into contact with and being exposed to Defendants' asbestos products so that Plaintiffs and other persons similarly employed would not inhale the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products.

i. Failed to adequately test their respective asbestos products before offering them for sale and use so that Plaintiffs and other persons similarly employed would not inhale

the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

j. Failed to render such asbestos products safe or to provide proper and sufficient safeguards for the use and handling thereof so that Plaintiffs and other persons similarly employed would not inhale the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

k. Failed to remove and recall such asbestos products from the stream of commerce and marketplace upon ascertaining that such asbestos products would cause asbestosis, scarred lungs, respiratory disorders, mesothelioma, cancers and other injuries, some or all of which are permanent and may be fatal;

l. Failed to comply with the Federal Hazardous Substance Act, Title 15, U.S.C.A. §1261, *et seq.*

m. Failed to advise the Plaintiffs and others similarly employed, who the Defendants knew or should have known had been exposed to long-term inhalation of asbestos dust and fibers, to cease all future exposure to the inhalation of all types of fumes, smoke, dust, and fibers, and to be examined by a lung specialist to determine the nature and extent of any and all diseases caused by such exposure and to receive treatment for such diseases.

COUNT II

14. Each Plaintiff hereby incorporates by reference Paragraphs One (1) through Thirteen (13) inclusive, as if the same were hereto set forth at length.

15. Defendants impliedly warranted that the asbestos products which they mined, manufactured, produced, processed, compounded, converted, sold, merchandised, supplied, distributed and/or otherwise placed in the stream of commerce were reasonably fit for use and safe for their intended purpose.

16. Defendants breached said warranties to Plaintiffs in that their said asbestos products were inherently defective, hazardous, dangerous, unfit for use, not properly merchantable, and not safe for their intended ordinary and foreseeable use and purpose.

COUNT III

17. Each Plaintiff hereby incorporates by reference Paragraphs One (1) through Sixteen (16) inclusive, as if the same were hereto set forth at length.

18. Defendants knew, or in the exercise of reasonable care should have known, that their asbestos products would be sold to the public including employers of workers at the Newport News Shipyard and would be used by Plaintiffs and other persons similarly employed, and would be relied on by such persons to be fit for the use and to accomplish the purpose for which they were mined, manufactured, produced, processed, sold, supplied, distributed and/or otherwise placed in the stream of commerce; and the Defendants, because of their positions as miners, manufacturers, producers, processors, sellers, suppliers and distributors, are STRICTLY LIABLE to each of the Plaintiffs for the following reasons:

a. Defendants as manufacturers-sellers are engaged in the business, *inter alia*, of selling asbestos products;

b. That at the time of the manufacture and sale of their asbestos products by the Defendants to the employer of the Plaintiffs, Defendants knew, or had reason to know, that the said asbestos products would be used by the Plaintiffs and other persons similarly employed, as the ultimate user or consumer;

c. That the said asbestos products were sold by the Defendants in a defective condition, unreasonably dangerous to the Plaintiffs and others similarly employed, as users

or consumers and that all throughout the many years of the Plaintiffs' exposure to and use of the said products, the said asbestos products were expected to and did reach the user or consumer without substantial change in the condition in which they were sold; and

d. That the said asbestos products were defective in that they are incapable of being made safe for their ordinary and intended use, and said Defendants failed to give adequate or sufficient warnings or instructions about the risks and dangers inherent in the products;

e. That the ordinary and foreseeable use of the Defendants' asbestos products is an intrinsically dangerous and ultra hazardous activity.

COUNT IV

19. Each Plaintiff hereby incorporates by reference Paragraphs One (1) through Eighteen (18) inclusive, as if the same were hereto set forth at length.

20. Defendants, individually, jointly and in conspiracy with each other, and as an industrial and trade association or group, for many decades have been possessed of medical and scientific data which clearly indicated that the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of their asbestos products were unreasonably dangerous, ultra hazardous, deleterious, poisonous, carcinogenic and potentially deadly.

21. Despite the medical and scientific data possessed by and available to them, the Defendants, prompted by pecuniary motives, individually, jointly and in conspiracy with each other, fraudulently, willfully, deliberately, maliciously and callously:

a. Ignored, withheld and/or actively concealed said medical and scientific data from the public, and particularly the workers such as the Plaintiffs, who were using and being

exposed to the Defendants' asbestos products and to the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

b. Caused to be released, published and/or disseminated data and reports concerning the dangers of their asbestos products, which data and reports they knew, should have known, or could have reasonably been determined to be incorrect, incomplete, outdated and misleading;

c. Failed and refused to provide the public, or workers such as the Plaintiffs, who would foreseeably use and/or be exposed to their asbestos products and to the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products, with any warning as to the dangers of their asbestos products which the Defendants knew, should have known, or could have reasonably determined to be inherent in the use of and exposure of people to said asbestos products and to the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

d. Deliberately chose to provide patently inadequate and ambiguous warnings and intentionally failed to warn of the known dangers when finally compelled by the state of medical art to provide notice of the dangers of their asbestos products and the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

e. Distorted and/or caused to be misdiagnosed the results of medical examinations conducted upon persons and workers such as the Plaintiffs, who were using and handling said asbestos products and being exposed to and the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

f. Refused and failed to test their asbestos products and/or tested their products and willfully concealed, or refused to publish adverse test results, or distorted said

adverse test results so that the public and workers such as the Plaintiffs were misled into believing the test results were not adverse;

g. Relied upon and caused to be disseminated tests, medical and scientific data that they knew, should have known, or could have reasonably determined to be inadequate, incomplete, outdated, and misleading.

22. Defendants, individually, jointly and in conspiracy with each other, participated in the fraudulent scheme described in Paragraph Twenty-One (21) above to keep the Plaintiffs and others similarly employed, in ignorance of their rights by fraudulently concealing the nature and extent of the harm which they have suffered as a result of using and being exposed to the Defendants' asbestos products and by fraudulently concealing that this harm was the direct and proximate result of the occupational use and exposure to the Defendants' asbestos products and the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products, and in fact said fraudulent scheme did keep the Plaintiffs and others similarly employed in ignorance of their rights.

23. Defendants, individually, jointly and in conspiracy with each other, intended by the fraudulent misrepresentations and omissions as set forth in Paragraph Twenty-Two (22) above to induce the Plaintiffs and others similarly employed, to rely upon said fraudulent misrepresentation and omissions, and to continue to expose themselves to the dangers that the Defendants knew to be inherent in the use of and exposure to their asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products, without warning the Plaintiffs and others similarly employed of these dangers, thereby depriving them of the opportunity of informed free choice as to whether to continue to use such asbestos products and to expose themselves to these dangers.

24. Defendants, individually, jointly and in conspiracy with each other and through trade associations in which they were members maliciously, willfully, callously and deliberately:

a. Exposed and continued to expose the Plaintiffs and others similarly employed to the risks and dangers of asbestosis, mesothelioma, scarred lungs, cancer and other illnesses and damage to various organs of the body, including injury to tissue and bone, all of which risks Defendants knew, should have known, or could have reasonably determined;

b. Failed to test and continue to test their asbestos products regarding the risks and dangers to persons who use or were exposed to their asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

c. Ignored medical and scientific data regarding the risks of asbestosis, scarred lungs, cancer, mesothelioma and other illness to workers such as the Plaintiffs who used or were exposed to their asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

d. Sought methods to ignore or defeat workmen's compensation and other claims of workers such as the Plaintiffs who suffered from illnesses or diseases from use of or exposure to their asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

e. Attempted to discredit scientists, doctors, writers, and medical literature, who or which indicated, demonstrated, or established a relationship between illness and disease from the use of and exposure to their asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

f. Refused to conduct research on the relationship between asbestos exposure and disease, because pecuniary motives of profit were followed at the expense of human lives;

g. Sought to create favorable publicity about asbestos products for pecuniary motives when they knew of their risks and dangers;

h. Failed to seek safe substitute products for asbestos for pecuniary motives of profit at the expense of human lives;

i. Misled the public and workers such as the Plaintiffs who used or were exposed to their asbestos products and indicating that their asbestos products were safe in their ordinary and foreseeable use;

j. Concealed the existence of tests, data, literature, and medical reports regarding the causal relationship of asbestos to cancer, mesothelioma, scarred lungs, asbestosis, respiratory disorders and other illnesses;

k. Refused to authorize testing and research involving the relationship of illness and disease to exposure, to use of and inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of their asbestos products, fearing adverse publicity would affect the highly profitable market of asbestos sales;

l. Chose to rely on inaccurate or insufficient medical and scientific research or data regarding the causal relationship between asbestos products and disease, in order to avoid any possible adverse publicity that would affect sales of their asbestos products;

m. Failed to place adequate or proper warnings on their asbestos products fearing that such warnings would adversely affect sales.

25. The Plaintiffs reasonably and in good faith relied upon the fraudulent misrepresentations, omissions, and

concealments made by the Defendants, individually, jointly, and in conspiracy with each other, regarding the safe nature of their asbestos products, which reliance resulted in illness and injuries to each Plaintiff, the particulars of which will be more fully herein set forth.

COUNT V

26. Each Plaintiff hereby incorporates by reference Paragraphs One (1) through Twenty-Five (25) inclusive, as if the same were hereto set forth at length.

27. As a direct and proximate result of the negligence, carelessness, gross negligence, willful misconduct, breach of warranty, strict liability, fraudulent concealment and misrepresentations and willful omissions of the Defendants, each Plaintiff was caused to contract diseases and injuries to his body systems, lungs, respiratory system, heart and damage to various organs of his body, including injury to tissue and bone such as, but not limited to, mesothelioma, asbestosis, scarred lungs, respiratory disorders, cancers and other injuries causing him pain, suffering and mental anguish, some or all of which may be permanent and/or fatal.

28. As a direct and proximate result of the negligence, carelessness, gross negligence, willful misconduct, breach of warranty, strict liability, fraudulent concealment and misrepresentation and wiliful omissions of the Defendants, each Plaintiff has been obliged to spend various sums of money to treat his diseases and injuries, and he may be obliged to continue to do so; and as a direct and proximate result of the aforesaid, each Plaintiff has and will sustain a loss of earnings and earning capacity; and as a direct and proximate result of the aforesaid. each Plaintiff's enjoyment of life has been impaired and his life expectancy shortened.

29. Each Plaintiff's causes of action as set forth herein accrued within two years of the filing of this complaint, and any delay in bringing these proceedings arises from fraud of

the Defendants as more particularly set forth in Count IV herein.

WHEREFORE, each of the named Plaintiffs prays for judgments against the Defendants, and each of them, jointly and severally for compensatory damages in the sum of ONE MILLION DOLLARS ($1,000,000.00), and punitive damages in the sum of TWO MILLION DOLLARS ($2,000,000.00) plus the costs of this suit, and such other and further relief as may be just and proper, and

WHEREFORE, all of the Plaintiffs in the aggregate, pray for judgment against the Defendants, and each of you, individually and jointly and severally for compensatory damages in the sum of FOURTEEN MILLION DOLLARS ($14,000,000.00) and punitive damages in the sum of TWENTY-EIGHT MILLION DOLLARS ($28,000,000.00).

Respectfully submitted,

JOHN W. WHITE, RONALD M. CASH,
DONAHUE ELLIS, WILLIE A. GIBBONS,
THOMAS J. HOGGE, MAURICE W. HOLLOWAY,
WILSON W. JONES, HUGH V. REYNOLDS,
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PLAINTIFFS DEMAND A JURY WITH RESPECT TO ALL ISSUES FOR WHICH THEY ARE ENTITLED BY LAW TO A JURY.

CERTIFICATE

I hereby certify that a true copy of the foregoing Amended Complaint was mailed to all counsel of record this day of August, 1977.

Of Counsel

Opposition

Office - Supreme Court, U.S.
FILED
DEC 11 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-882

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHNS-MANVILLE CORP., *et al.*,
Petitioners

v.

JOHN W. WHITE, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that, under the principles established in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972), the injuries to respondents, who had spent over 90 per cent of their time on the navigable waters constructing and repairing ships, had a significant relationship to traditional maritime activity.

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Respondents John W. White, J. T. Oman, Fred R. Walker, Willie A. Gibbons and Hugh V. Reynolds were all long-time employees at the Newport News Ship Building and Dry Dock Company.[1] As such, they installed materials containing asbestos on pipes, boilers and other machinery in ships on the navigable waters and in the Newport News shipyard. Pet. App. 31a. In addition, they were required to remove old asbestos insulation previously installed on ships. In affidavits, respondents estimated that "at least 90% and as much as 97% of their

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[1] Respondents were employed for periods ranging from 22 years to 42 years.

exposure to the manufacturers' products occurred on navigable waters." Pet. App. 38a (Widener, J., concurring). These asbestos products, with which respondents were in continual contact, were manufactured by petitioners.[2] Pet. App. 31a.

While working with asbestos products, respondents were repeatedly exposed to asbestos dust generated by cutting, sawing and otherwise using asbestos. Once airborne, these microscopic fibers are inhaled into the lungs. Sufficient exposure to asbestos, in terms of both quantity and time, can produce asbestosis, mesothelioma, lung cancer, and other serious diseases. The disease of asbestosis, with which these cases are primarily concerned, is a debilitating, progressive disease causing, among other things, shortness of breath, severe weakness, and pain in the lungs and chest. Pet. App. 31a. In its more advanced stages, asbestosis frequently results in death. Respondents all testified to suffering considerable pain and disability from asbestosis.

During the time that respondents were exposed to asbestos, petitioners knew that such exposure could cause asbestosis and other fatal diseases. Despite this knowledge, petitioners neither warned respondents of the risk of such diseases nor advised them about safety precautions available to reduce the risk. See J.A. 39-42, 43-48, 103-106, 108-109, 140-143, 144-149.[3] As a result, respondents ultimately contracted asbestosis.

Each respondent then brought an action against petitioners to obtain relief for his disability. In a series of jurisdictional and evidentiary rulings, the district court

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[2] Defendants in each case were Johns-Manville Corporation, Owens-Corning Fiberglass Corporation, H.K. Porter Company, Pittsburgh Corning Corporation, Unarco Industries, Inc., Eagle-Picher Industries, Inc., Raybestos-Manhattan, Inc., and Celotex Corporation.

[3] "J.A." refers to the Joint Appendix filed in the court of appeals.

ultimately denied all recovery. First, the court found that it had no jurisdiction in admiralty and that, under diversity jurisdiction, Virginia law barred all recovery for persons not exposed to asbestos within two years prior to suit. Second, the court held that Virginia law also barred recovery for injuries, whenever suffered, if they were attributable to exposure to asbestos more than two years prior to suit. Finally, after the jury had returned a sizeable verdict for each respondent, the court entered judgment for petitioners notwithstanding the verdicts, stating that respondents had failed to quantify the damage arising from exposure to asbestos within the limitation period.

The ruling on general admiralty jurisdiction, the issue now addressed in the petition for certiorari, was made more than 18 months before trial with only a brief explanation. Pet. App. 1a-17a.[4] Without even considering the involvement of respondents in maritime activities, the court simply stated that "we find no significant relationship between the wrongs here alleged, the hazards of asbestos products applied to pipes and insulation, and 'traditional maritime activity involving, navigation and commerce in navigable waters.'" Pet. App. 7a. The court did not address respondents' contentions that they had spent virtually all of their working time on the navigable waters installing or repairing materials essential to safe navigation or that petitioners had in fact designed and marketed the asbestos materials specifically for maritime use.

The court of appeals reversed. Noting that under *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972), "the exercise of admiralty jurisdiction must be confined to matters of maritime commerce and navi-

[4] The court also declined to find jurisdiction under the Extension of Admiralty Act (46 U.S.C. § 740) and the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901 *et seq.*). See Pet. App. 3a-6a.

gation," Pet. App. 33a, the court found that the requirements of *Executive Jet* had been satisfied in these cases. On the issue of maritime situs, the court observed that respondents had been injured while performing work "at both the shipyard and dry dock areas as well as aboard the vessels while they were located on navigable waters." Pet. App. 34a. In his concurring opinion, Judge Widener specifically noted the "overwhelming predominance of exposure [to asbestos] arising in the proper maritime situs." Pet. App. 38a. The court held that these facts satisfied the locality test of *Executive Jet*. Pet. App. 34a.

Recognizing that respondents were also required to show a significant nexus with traditional maritime activity, the court then examined the circumstances surrounding the injuries to respondents. In this regard, the court noted that each respondent had spent a "significant part of his working career" installing and replacing asbestos materials on seagoing vessels. Pet. App. 34a. The court emphasized the importance of such activities to traditional maritime commerce, pointing out that insulation materials "by their very nature become an appurtenance, or integral part, of the ship . . . ." Pet. App. 34a. The court thus concluded that "the installation of the asbestos products has a direct effect on marine navigation and commerce." Pet. App. 34a.

The court rejected the idea, suggested by petitioners, that a finding of admiralty jurisdiction would sweep all cases involving use of products on vessels into admiralty. The court found that "the materials used by these shipyard workers were designed, advertised, and marketed as maritime asbestos products." Pet. App. 35a. Thus, as the court further observed, "it was quite foreseeable by the manufacturers that these materials would be primarily sold and fabricated for use on ships." Pet. App. 35a. The court expressly declined to decide whether the same holding would apply "where the defective component was not limited to admiralty use." Pet. App. 35a.

Judge Widener issued a separate concurring opinion, noting that the claims in this case might be regarded as sounding in contract as well as tort law. He concluded, however, that in light of the findings of both maritime situs and nexus, "the plaintiffs' claims, whether sounding in tort or in contract, are cognizable in admiralty." Pet. App. 40a.[5]

ARGUMENT

The decision of the court of appeals, finding admiralty jurisdiction over claims by workers injured while constructing and repairing ships on the navigable waters, is correct and does not warrant further review. Although petitioners claim that the decision below is in conflict with the decision of this Court in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972), the Fourth Circuit carefully applied the standard established in *Executive Jet* to the particular facts of this case, properly concluding that the wrong to these workers had a substantial nexus to traditional maritime activity. Moreover, despite petitioners' further suggestion that the decision below conflicts with decisions of the Fifth and Ninth Circuits, the fact is that the courts of appeals have uniformly recognized the right to sue manufacturers of maritime products in admiralty for damage or injuries suffered on the navigable waters. In any event, as we discuss initially below, the petition is premature in light of the extensive proceedings still remaining in the district court, including a determination of the defense of laches and the conduct of a new trial.

1. *The Petition is Premature.* After the decision of the Fourth Circuit remanding the case for further pro-

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[5] In a companion case, the Fourth Circuit also found admiralty jurisdiction over the case of a 30-year Navy veteran, who had died of cancer caused by constant exposure to asbestos dust in the performance of his duties. *Vaughan* v. *Johns-Manville Corp.*, No. 79-1580, decided October 5, 1981. No petition for review of that decision has been filed.

ceedings, the case stands in no different posture than if petitioners had made a motion to dismiss the case for want of admiralty jurisdiction and the motion had been denied. Petitioners in that instance, rather than seeking piecemeal review, would be obliged to develop a record on the issue of laches and then proceed to trial. If they were successful in establishing laches or in defending on the merits at trial, of course, the need for further review would be eliminated. On the other hand, if petitioners were unsuccessful, they could then seek review of all adverse holdings at the same time and upon a proper record.

The same procedure should be followed here. In ruling on the issue of admiralty jurisdiction, the Fourth Circuit held that the doctrine of laches must be applied with regard to the "insidious nature of the disease" of asbestosis and that petitioners bear the burden of proving inexcusable delay and prejudice. Pet. App. 36a. The court, however, expressly declined to decide the merits of the laches issue, saying that "the district court must first determine how far back the applicable exposure period for each employee should be extended." Pet. App. 36a. The court noted that the findings on the laches issue will also be necessary to "ascertain which manufacturers are proper party defendants for each plaintiff," Pet. App. 36a, indicating that the interests of petitioners may well be altered by those findings. The determination of these issues, in turn, will plainly affect the type and extent of proof admissible at the trial itself. There is no reason to grant review before these issues have been resolved on a full record.[6]

2. *The Decision Below Is Not in Conflict With Any Decision of this Court.* The decision of the court of ap-

[6] This Court, of course, would be able to review all issues presented at that time. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assoc.*, 99 S. Ct. 3055, 3068 n. 19 (1979); *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955).

peals is not in conflict with *Executive Jet Aviation, Inc.* v. *City of Cleveland*, *supra*, or with any other decision of this Court. Although petitioners purport to find such a conflict, the court below correctly applied the standards of *Executive Jet* to the facts of this case.

As petitioners' own "Question Presented" makes clear, Pet. 2, the Fourth Circuit expressly recognized that the principles of *Executive Jet* are controlling in this case. See Pet. App. 33a. Observing that *Executive Jet* "sets forth the controlling criteria for determining whether a tort action is 'maritime' and thus within the admiralty jurisdiction of the federal courts," the court went on to state that "a plaintiff must satisfy both the maritime locality and 'nexus' requirements to invoke the admiralty jurisdiction of the district court." Pet. App. 33a. The court further emphasized that "the exercise of admiralty jurisdiction must be confined to matters of maritime commerce and navigation." Pet. App. 33a.

Far from acting in conflict with *Executive Jet*, the court of appeals then undertook precisely the inquiry contemplated by that decision. Having disposed of the situs issue, a disposition not seriously challenged here, the court took considerable pains to examine whether respondents were injured not only on the navigable waters but also in connection with some traditional maritime activity. In order to "determine whether the factual circumstances surrounding the employees' injuries satisfy the maritime 'nexus' requirement," Pet. App. 34a, the court thus looked to the work performed by respondents in equipping and maintaining vessels for maritime commerce. The court concluded that the nexus requirement had been satisfied "because the installation of the asbestos products has a direct effect on marine navigation and commerce." Pet. App. 34a.

This conclusion is entirely justified on the facts presented here. As the court noted, each respondent spent the vast majority of his working life on the navigable

waters installing or replacing insulation on naval and commercial ships. Pet. App. 34a. Congress has recognized that such activities constitute "maritime employment," see 33 U.S.C. § 902(3), and, indeed, the job of pipe covering has traditionally been performed by a ship's crew while at sea. Moreover, the use of proper insulation upon ships is a necessary part of maritime commerce since effective heat insulation in engines and boiler rooms remains essential to the navigation of a ship. Even respondents must concede the importance of these activities to maritime commerce for, as the court of appeals observed, "the materials used by these shipyard workers were designed, advertised, and marketed as maritime asbestos products." Pet. App. 35a.

Although petitioners suggest that the court of appeals devised a "worker status" concept and a "marketing technique" concept as a substitute for the general *Executive Jet* test, Pet. 10, that contention misconceives the nature of the decision below. Comparing this case to *Executive Jet*, where the only connection with the maritime world was the unexpected crash of a plane in Lake Erie, the court of appeals found it entirely foreseeable that the injury to respondents would occur on navigable waters. Here, the products at issue were designed for use on navigable vessels, were advertised for use on such vessels, were considered essential to the safe operation of such vessels, and were in fact used by respondents on such vessels to their ultimate detriment. Respondents thus were injured on the navigable waters not by mere chance but by virtue of their occupation installing and repairing products made by petitioners for precisely that purpose. Under the circumstances, it is frivolous for petitioners to claim that the link between their activities and maritime commerce is "purely fortuitous." Pet. 10.

Finally, it is noteworthy that the Fourth Circuit made sure to limit its holding to the circumstances presented in this case. While it acknowledged that admiralty jurisdiction might extend even to products not designed for

maritime use, provided that they somehow found their way onto the navigable waters, the court declined to go so far. See Pet. App. 35a; *Sperry Rand Corp.* v. *Radio Corp. of America*, 618 F.2d 319 (5th Cir. 1980). The court instead held only that "under the circumstances of these cases, when the materials used by these shipyard workers were designed, advertised and marketed as maritime asbestos products, the *Executive Jet* criteria have been met . . . ." Pet. App. 35a. Moreover, Judge Widener, in his concurring opinion, cautioned against reading the decision to support admiralty jurisdiction in cases where the extent of exposure on navigable waters fell far short of the high levels established here. Pet. App. 38a-39a.

3. *The Decision Does Not Conflict With Decisions of Other Courts of Appeals.* Although petitioners suggest that the decision below also conflicts with decisions of the Fifth and Ninth Circuits, the conflict is entirely imaginary. Indeed, the cases cited by petitioners contradict the very argument that they seek to make. See *Sperry Rand Corp* v. *Radio Corp. of America, supra*; *Jig the Third Corp.* v. *Puritan Marine Ins. Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976); *Pan-Alaska Fisheries, Inc.* v. *Marine Const. & Design Co.*, 565 F.2d 1129 (9th Cir. 1977); *Jones* v. *Bender Welding & Machine Works, Inc.*, 581 F.2d 1331 (9th Cir. 1978).

To begin with, the cases cited are uniformly cases *upholding* the exercise of admiralty jurisdiction, an odd place to look for conflict with another case upholding admiralty jurisdiction. Moreover, although the cases all involved damage to ships, there is not one word in any of them that would imply a different result if the injury had been to persons aboard the ships rather than to the ships themselves. The fact that damage to ships is cognizable in admiralty hardly establishes that injuries to persons aboard ships are not.

It is, in fact, entirely illogical to contend that only damage to ships satisfies the nexus test of *Executive Jet*.

The appropriate inquiry in each case is simply whether the wrong at issue "bears a significant relationship to traditional maritime activity." 409 U.S. at 268. By necessity, traditional maritime activity involves not only the vessels themselves but the seamen and other workers necessary to operate them. No court of appeals has drawn a line leaving those seamen and workers outside the scope of admiralty jurisdiction.

The cited cases also belie the notion, advanced by petitioners (Pet. 10), that admiralty will not lie because *their* actions in manufacturing asbestos and failing to warn of its dangers do not have a significant relationship to maritime activity. In each of the cases, the courts looked not simply to the actions of the manufacturers but to the effect of those actions on the plaintiffs. The courts, therefore, recognized the commonsense proposition that the wrong in question is not just the negligent manufacture or failure, which in itself is not harmful, but the damage or injury resulting from those actions. The decision below, which adopts the same reasoning, is thus entirely consistent with the cases in other circuits.

4. *The Case is Not of Exceptional Importance.* While petitioners contend that the decision below will "have an adverse impact on a large volume of litigation" (Pet. 12), that concern is vastly overstated.[7] As was the case before the decision, the existence of admiralty jurisdiction in each case will depend upon its particular facts.

Petitioners attempt to expand the impact of the holding below by arguing that "workers who allege any exposure to asbestos hazards upon navigable waters (situs) may have their cases tried according to the principles of admiralty law." Pet. 12-13. But the Fourth Circuit did not hold, or even imply, that *any* exposure to asbestos on

[7] As petitioners concede (Pet. 13), the question here is not whether these cases will be tried in state or federal court but only whether "the same courts" (*i.e.* federal courts) will proceed in admiralty or under state law.

the navigable waters would support admiralty jurisdiction; it found only that these workers, who had suffered "at least 90% and as much as 97% of their exposure to the manufacturers' products . . . on navigable waters" (Pet. App. 38a) (Widener, J., concurring), had the requisite connection to maritime activities to satisfy the test of *Executive Jet*. Indeed, as we have noted, Judge Widener specifically warned that the decision "should not . . . be read to imply a similar rule in all cases in which there is exposure to injury both on land and on navigable waters." Pet. App. 38a-39a. Thus, the full scope of the decision remains uncertain even in the Fourth Circuit itself.

Although petitioners also complain that recognition of admiralty jurisdiction will make similar cases subject to different laws (Pet. 12-13), that is a natural consequence of having admiralty jurisdiction in the first place. The requirement of proper situs, which this Court reaffirmed in *Executive Jet*, necessarily means that certain wrongs occurring on the navigable waters will be treated differently from wrongs occurring on shore. Moreover, to the extent that cases involving exposure to asbestos products are not subject to admiralty jurisdiction, they are governed by the vagaries of individual state laws. If anything, the existence of admiralty jurisdiction may provide more uniformity, not less, in this type of case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Petitioner's Reply Brief

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No. 81-882

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHNS-MANVILLE CORPORATION,
JOHNS-MANVILLE SALES CORPORATION,
OWENS-CORNING FIBERGLAS CORPORATION,
H.K. PORTER COMPANY, INC.,
SOUTHERN TEXTILE CORPORATION,
PITTSBURGH CORNING CORPORATION,
RAYBESTOS-MANHATTAN, INC.,
THE CELOTEX CORPORATION,
UNARCO INDUSTRIES, INC., and
EAGLE-PICHER INDUSTRIES, INC.,

Petitioners,

v.

JOHN W. WHITE,
JAMES T. OMAN,
FRED R. WALKER,
HUGH V. REYNOLDS, and
WILLIE A. GIBBONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REPLY BRIEF OF PETITIONERS

I. QUESTION PRESENTED

SHOULD THIS COURT EXERCISE ITS JURISDICTION OVER THE FUNDAMENTAL ISSUE OF ADMIRALTY JURISDICTION UNDERLYING THIS CASE AND ASBESTOS LITIGATION THROUGHOUT THE UNITED STATES?

II. PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The corporate parents, subsidiaries and affiliates of the petitioners (required by Sup.Ct.R. 28.1) are set forth in the Petition for Writ of Certiorari.

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V. ARGUMENT

The question of whether the Petition for Certiorari is premature was first raised in Respondents' Brief in Opposition. Pursuant to Sup.Ct.R. 22.5, this Reply Brief is addressed solely to that issue.

> THE WRIT SHOULD BE GRANTED BECAUSE THE ADMIRALTY JURISDICTION ISSUE IS FUNDAMENTAL TO THIS CASE AND TO ASBESTOS LITIGATION THROUGHOUT THE UNITED STATES.

It is a venerable principle that the comprehensive grant of jurisdiction under 28 U.S.C. §1254 (1) does not require "finalty" below. *E.g.*, *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); *Forsyth* v. *Hammond*, 166 U.S. 506, 511-14 (1897). This Court has jurisdiction to take the case, regardless of its status in the lower courts, once the jurisdiction of the court of appeals has been properly invoked and a timely petition for certiorari has been filed. *The Conqueror*, 166 U.S. 110, 113-14 (1897). It is undisputed that all jurisdictional prerequisites have been met by the petitioners.

Moreover, this Court will review a ruling of law that is "fundamental to the further conduct of the case," despite a remand for a new trial. *E.g.*, *Gillespie* v. *United States Steel Corporation*, 379 U.S. 148, 153-54 (1964); *United States* v. *General Motors Corporation*, 323 U.S. 373, 377 (1945). In view

of the substantive differences between Virginia law and maritime law (covering a plethora of trial issues such as contributory negligence/comparative negligence, statute of limitations/laches, measure of damages, etc.), it cannot be disputed that the Circuit Court's ruling is "fundamental to the further conduct of this case."

Respondents' contention that this Petition is premature ignores the reality of asbestos litigation in Virginia and throughout the country. The Circuit Court's ruling is not only fundamental to further conduct of this individual case, it also is fundamental to hundreds of other asbestos cases in Virginia and thousands of others across the nation.

Similarly, respondents' analogy to a motion to dismiss is inapposite. Here, there has been a trial on the merits. The record is fully developed and ripe for review. It would be both unfair and administratively inefficient to require another trial and another appeal before determining that the issue had matured.

VI. CONCLUSION

Consistent with the aforecited authorities, the question presented is fully developed for review. Consequently, the Petition for Certiorari should be granted.

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